No. 83-526

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN
and JOHN S. SLEASMAN,
Petitioners,

VS.

CANINE EYE REGISTRATION FOUNDATION, INC.,
LAWRENCE M. TRAUNER, DOLLY B. TRAUNER,
DAVID E. LIPTON, ALAN D. MACMILLAN,
DENNIS D. OLIN, RANDY SCAGLIOTTI
and RALPH VIERHELLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DATED: September 23, 1983

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QUESTIONS PRESENTED

1. Whether the decisions by the Magistrate and by the Court of Appeals, which, as a matter of law, held that there was "insufficient evidence of an agreement" *notwithstanding the unequivocal admissions by the defendants to the contrary,* are plainly inconsistent with the binding precedent of this Court's prior decisions and amount to a *de facto* and *de jure* deprivation of the petitioners' Constitutional right to trial by jury?

2. Whether the decisions by the Magistrate and by the Court of Appeals, which, as a matter of law, held that there "was no competent or relevant evidence from which a jury could fairly estimate damages" *notwithstanding,* inter alia, *the testimony of several past and potential customers that they would have done business with the petitioners but for the defendants' agreement,* are plainly inconsistent with the binding precedent of this Court's prior decisions, and amount to a *de facto* and *de jure* deprivation of the petitioners' Constitutional right to trial by jury?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement of the case	3
A. The parties	3
1. Petitioners	3
2. Respondents	3
(a) ACVO's	3
(b) CERF	5
B. Course of proceedings and disposition below	5
1. Decisions by the magistrate	5
2. Decision by the court of appeals	6
C. Material facts	6
1. The existence of the agreement	6
(a) Trial testimony of co-founder and chairman of CERF	7
(b) Trial exhibit and testimony of chairman of ACVO/Liaison Committee	9
(c) Trial exhibit of ACVO member Bryan to Vierheller, chairman, ACVO/CERF Liaison Committee, Vanessi, ACVO president, and Rubin, ACVO president-elect	10
2. Evidence of the conspirators' knowledge that the agreement restrained CERF, nonmembers of ACVO and the market	10
(a) Trial testimony of co-founder and chairman of CERF	10
3. The decision to exclude non-ACVO's was not unilaterally made	14
(a) Trial exhibits of co-founder and chairman of CERF	14

TABLE OF CONTENTS

		Page
4.	Competent and relevant evidence from which a jury could fairly estimate damages	15
5.	Without competition from the non-ACVO's, the ACVO's accepted an invitation to fix prices	16
	(a) Trial exhibit of co-founder and chairman of CERF to secretary of ACVO	17
	(b) Trial testimony of co-founder and chairman of ACVO	17
	(c) Trial testimony of chairman of ACVO/ Liaison Committee	18
	(d) Trial testimony and exhibits showing parallel pricing by ACVO's	19
Reasons for granting the writ		19
I		
The decision by the Court of Appeals for the Ninth District plainly ignores decades of decisions by this court on the elements necessary to prove a conspiracy and damages in antitrust cases, threatens the public policy behind the private enforcement of the antitrust laws, subjects private antitrust plaintiffs to the uncertainty of whether the established law will be followed, and fosters further miscarriages of justice by substituting ad hoc interpretations for the settled principles of law previously stated by this court		19
II		
The Ninth Circuit's opinion with respect to the question of what constitutes permissible and competent proof of antitrust damages represents an abrupt departure from accepted standards for proof of damages enunciated by this court		23
Conclusion		24

APPENDIX

App. A: Ninth Circuit Opinion, 1983-1 Trade Cases, ¶ 65 355 ..... A-1

App. A-1: Ninth Circuit Opinion, May 3, 1983 ..... A-16

App. B: District Court's Findings of Fact and Conclusions of Law, September 30, 1981 ..... A-30

App. C: District Court's Memorandum and Order Granting Summary Judgment re: Antitrust Damages, June 24, 1981 .... A-47

App. D: District Court's Partial Final Judgment, Pursuant to Rule 54(b), November 17, 1981 ..... A-58

App. E: Ninth Circuit's Order denying request for rehearing *in banc*, July 27, 1983 ..... A-61

TABLE OF AUTHORITIES CITED

Cases

Page

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 20

Continental Ore v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) 21

Eastern Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 23

Interstate Circuit v. United States, 306 U.S. 209 (1939) 20

Klor's v. Broadway Hale, 359 U.S. 207 (1959) 22

Montague & Co. v. Lowry, 193 U.S. 38 (1905) 21, 22

Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 346 U.S. 656 (1961) 22

Radovich v. National Football League, 352 U.S. 445 (1957) 22

Rickards, et al. v. Canine Eye Registration Foundation, Inc., et al. (9th Cir. 1983) 1983-1 Trade Cases ¶ 65,355 1

Storey Parchment Co. v. Patterson Paper, 282 U.S. 555 (1930) 23

Statutes

28 U.S.C. § 1254(1) 2

Clayton Act:

Section 4, 15 U.S.C. § 15 2

Section 16, 15 U.S.C. § 26 6

Sherman Act:

Sections 1 and 2, 15 U.S.C. §§ 1, 2 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered on May 3, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1983-1 Trade Cases ¶ 65,355, and is attached to this petition as Appendix A. The Findings of Fact and Conclusions of Law by the Magistrate is attached to this petition as Appendix B. The Magistrate's Order and Memorandum granting

Summary Judgment against the petitioners on the amount of damages is attached to this petition as Appendix C. The Partial Final Judgment filed by the Magistrate on November 17, 1981 is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was filed May 3, 1983. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied July 27, 1983. (App. E) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The petitioners filed this action pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15) alleging injury and damage caused by reason of the respondents' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Those statutes state, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .[*Id.* 15 U.S.C. § 1]
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . [*Id.* 15 U.S.C. § 2]
>
> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States . . . [*Id.* 15 U.S.C. § 15]

STATEMENT OF THE CASE

A. THE PARTIES

1. Petitioners

The petitioners are duly-licensed veterinarians practicing in California, Missouri, Ohio and Washington. A major part of their practice involves the care and treatment of small animals, primarily dogs. Prior to the commencement of this action, an important aspect of their practice was the examination of the eyes of pure-bred dogs for the purpose of detecting genetic eye diseases. These examinations were an indispensible prerequisite for breeders, sellers and buyers of pure-bred dogs. By reason of the respondents' agreement, all veterinarians who were not a party to this agreement, including the petitioners, were excluded from the market of conducting eye-screening examinations of pure-bred dogs. This exclusion resulted in a drastic decline in the petitioners' ophthalmology business. (PXS. 72-75, 124, 129, 131, 135, 185, 196, 219, 248, and 254; RT. 197-201, 247, 255, 399, 2411-2412, 2542-2543, 2081-2083, 3607, 3671, 3674, 3718-3719, 5278-5282, 2292-2298, 5053, 4127, 4132-4134, 4169, 4243, 4461)

2. Respondents

(a) ACVO's

The respondent veterinarians are members of a professional association known as the American College of Veterinary Ophthalmology ("ACVO"). The ACVO was founded in 1970 by a group of veterinarians, most of whom were non-practicing professors of veterinary medicine. During the relevant time period, there were 35 members of the ACVO. Of those, 24 were admitted to the ACVO without taking any admission examination. (RT. 2049-50, 2055)

The founders of the ACVO, like the petitioners, were at one time all members of a rival association: the American Society of Veterinary Ophthalmology ("ASVO"). (RT. 4251) The ACVO's splintered off from the ASVO and formed the ACVO. (RT. 4251, 4253-4254)

The ACVO is sometimes referred to as a college, but it is not a college in the normal sense of the word. (RT. 1299-1231) It is an association of veterinary corporations and sole proprietorships. (RT. 4294, 4466, 1025; PX. 32)

During the relevant time period, certain ACVO's were in direct competition with petitioners for hereditary eye-screening business. Specifically: ACVO Dice was in direct competition with petitioner Sleasman. (RT. 2292-2293, 2309, 2317-2322, 2297) ACVO MacMillian was in direct competition with petitioner Custer. (RT. 3671-3674) ACVO Parshall was in direct competition with petitioner Rickards. (TR. 5438, 4607; PX. 374-A) ACVO Jensen was in direct competition with petitioner Belkin. (TR. 2079-2083; 2218-2219; PX. 374-A)

In addition, and by reason of the respondents' agreement excluding non-members of the ACVO, members of the ACVO were able to service clients who would have otherwise been serviced by petitioners. ACVO Vierheller, who practiced in Los Angeles, California, and ACVO Lipton, who practiced in Richmond, California, would periodically fly to San Diego, California, where petitioner Custer practiced, to conduct eye-screening clinics for pure-bred dogs. (RT. 3666-3671; 3674, 3718-3719) Similarly, ACVO MacMillan who practiced in Davis, California and San Diego, California, respectively, would periodically fly into Cleveland, Ohio, where petitioner Rickards practiced, to conduct

eye-screening clinics for pure-bred dogs. (TR. 5438, 4607, 4694)

(b) CERF

Canine Eye Registration Foundation, Inc. ("CERF") is a non-profit lay organization which registers pure-bred dogs found to be free of genetic eye defects. Any pure-bred dog which was examined and found free of genetic eye defects would be registered by CERF, and the owner of the dog would be sent a registration certificate verifying the dog was free from genetic eye defects. The CERF certificate was unique, and dog breeders became convinced that it was necessary in order for them to sell their dogs. (RT. 3671, 2287-93, 2252-54, 4243; PX. 1815).

CERF was formed with the agreement between CERF and the members of ACVO that CERF would issue a registration certificate only to those clients whose dogs were examined by a member of the ACVO. (PXS. 219, 124, *infra.*) An examination done by a non-member of ACVO would not be accepted. This agreement was entered into notwithstanding the fact that both CERF and ACVO's knew that non-members of the ACVO were as competent, if not more competent, to conduct these examinations than the members of ACVO. (RT. 247, 254-256, 197-201; PXS. 128, 274, 358, 359)

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

1. Decisions by the Magistrate

Two weeks before the trial, the Magistrate heard and granted the respondents' motion *in limine* and for summary judgment on the sole issue of proof of the *amount*

of damage, since the fact of damage had been conceded for purposes of the Rule 56 motion brought by respondents. (App. C)

The trial proceeded on petitioners' state law claims and petitioners' claim for injunctive relief pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26).

On September 30, 1981, the trial court dismissed the petitioners' antitrust injunctive claims and directed a verdict for respondents on petitioners' state court claims.

On November 19, 1981, the Magistrate entered a Partial Final Judgment and dismissed with prejudice all claims brought by petitioners against respondents. (App. D)

On December 15, 1981, petitioners filed their Notice of Appeal.

2. Decision by the Court of Appeals

On May 3, 1983, the Court of Appeals for the Ninth Circuit affirmed the decisions by the Magistrate in all respects. (App. A)

On July 27, 1983, the Court of Appeals denied the petitioners' Petition for Rehearing and Suggestion for Rehearing *In Banc*. (App. E)

C. MATERIAL FACTS

1. The Existence of the Agreement

The Court of Appeals for the Ninth Court held as a matter of law that:

> **On the record before this Court there is insufficient evidence of an agreement.**

• • •

Since there was no agreement between CERF and ACVO members to exclude non-members, there is nothing in the record supporting appellants' group boycott theory.

The evidence is clearly to the contrary:

(a) Trial Testimony of co-founder and chairman of CERF:

Q. What does tacit approval mean?

A. Tacit approval? Unspoken approval.

Q. And that's what you were expecting from ACVO, were you not?

A. I was expecting cooperation which would certainly indicate approval.

Q. And if not in writing, at least tactit approval and understanding between you and ACVO?

A. An unspoken approval demonstrated by their cooperation.

Q. Demonstrated by their cooperation, that is working together, is it not, in agreement?

A. Correct.

Q. Having an understanding with them; is that true?

A. Hopefully.

Q. And that is what you expected from ACVO?

A. Hopefully. [RT. 197-198]

• • •

Q. And it is stated [in PX.15 to ACVO Rubin] as follows:

> "But we recognize that without the tacit approval and cooperation of the majority of the ACVO members on an individual basis, any such program is doomed from the start."

Do you see that?

A. Yes.

Q. And that was a true statement when it was made at the time; is that true?

A. Yes.

Q. So it was your understanding, was it not, that this program, this CERF program from the very start would be doomed if you were unable to get the tacit approval of the ACVO members on an individual basis?

A. Correct.

Q. So that you must for this program to succeed, ACVO members personally had to agree to it?

A. Yes.

Q. And that was your understanding with them?

A. Yes.

Q. And part of the program was that only ACVO members would be permitted to conduct the examinations in order for a certificate to issue?

A. We were sorry to say that that is the case.

Q. Well, whether you were sorry to say or not, that was your understanding and agreement?

A. Yes.

Q. Between CERF and the individual members of ACVO?

A. Yes.

Q. Now you knew, did you not, by reason of that agreement that one of the necessary effects would be that non-ACVO members would not be able to conduct the examinations for the breeders and the owners and getting a certificate from CERF?

A. That is true.

Q. So you knew right from the beginning and as part of this tacit understanding with the individual members of ACVO that other veterinarians, non-ACVO members would be excluded from this program?

A. Unfortunately, yes.

Q. But that was the understanding between you and these individual members of ACVO?

A. That is correct.

Q. And they knew, as far as you know, they also understood, these individual ACVO members, that these other veterinarians, non-ACVO members would be excluded?

A. They knew that we were excluding non-ACVO's and non-designates.

Q. And as far as you were aware, the ACVO members individually knowing that, knowing that these non-ACVO members would be excluded, nonetheless agreed to the program?

A. They did. [RT. 199-201]

• • •

Q. In any event, exaggeration or no, the idea was to sell it, as I understand your testimony now, to the ACVO people. You wanted to tell them that, look, this program could be done to such an extent, making the certificate so desirable that if breeders did not get the certificate, they'd be frowned upon by their peers, and it would make it more difficult to sell their dogs?

A. Correct.

Q. And that was an economic incentive, was it not, and you understood it to be such both for the breeders and the owners, and for the ACVO members, because they were the only ones who could conduct the exams?

A. Correct. [RT. 206]

(b) Trial Exhibit and Testimony of Chairman of of ACVO/Liaison Committee

Please read the enclosed letter which CERF proposes to send to parent clubs of major breeds announcing the existence of the CERF and its purposes. *The letter will not be sent without our approval. Do you object* to their statement that

they will accept for registry "only dogs found to be clear of major hereditary eye diseases by a diplomate of the American College of Veterinary Opthalmologists?" [PX. 124, Letter from Dr. Vierheller to members of ACVO Committee (RT. 28080)]

• • •

Q. Isn't it a fact that the ACVO diplomates did not, those that you contacted in your position, did not object, but, indeed, approved of the restriction?

. . .

The Witness: I don't recall any firm objections. [RT. 2805-2806]

(c) Trial Exhibit of ACVO member Bryan to Vierheller, chairman, ACVO/CERF Liaison Committee, Vanessi, ACVO president, and Rubin, ACVO president-elect

I don't feel threatened by the prospect of non-ACVO members being in the CERF program; but I realize some do and *must* respect their position. [PX. 178, Letter from Bryan to Rubin, Vainisi and Vierheller]

2. Evidence of the Conspirators' Knowledge That the Agreement Restrained CERF, Non-members of ACVO and the Market

(a) Trial Testimony of co-founder and chairman of CERF:

Q. [PX. 128] "But since this, or any other similar program, depends on the confidence and cooperation of the diplomats . . . ."

Now, diplomats are ACVO people?

A. Correct.

Q. "... We have restrained ourselves to work only within the limits of approval indicated from time to time by the ACVO-CERF liaison committee headed by Dr. Ralph C. Vierheller."

• • •

Q. So that you yourself, meaning CERF, you restrained yourself based upon or within the limits indicated by Dr. Vierheller of ACVO; is that true?

A. Yes. [RT. 242-244]

• • •

Q. So directing your attention to the fifth paragraph [of Pl.Ex.274] stated as follows:

> I stated that CERF was also 'between a rock and a hard place.' On the one hand we recognized that there probably were non-diplomates who, by training and experience, might be fully capable of handling even the most difficult types of diagnoses every bit as well (perhaps even better, in some cases) as a diplomate."

Did you believe that at the time you wrote that?

A. It was a probability and a possibility, as I stated in the memo. [RT. 254]

• • •

Q. ... You knew that because of this arrangement and understanding between CERF and ACVO that these veterinarians who were as good if not better than the ACVO members were excluded from the market of breeders and owners who wanted the certificate?

A. I knew that, yes. [RT. 256]

• • •

Q. So that you understood the possibility that there would be a demand, the supply of which could not be filled?

A. That was an unfortunate situation, yes. [RT. 246-247]

• • •

Q. And the supply and demand situation was frustrated and restrained, you understood, by reason of this agreement between CERF and ACVO that only ACVO people could conduct these exams? Is that true?

A. Yes.

Q. Now you understood, did you not, that notwithstanding that frustration that there were, in fact, other veterinarians who were not ACVO members but who by training and experience could conduct these exams?

A. It was possible.

Q. No. You understood that, did you not?

A. It was highly possible and even probable. [RT. 247]

• • •

Q. "It is believed that there are a number of veterinarians who, both by training and experience, would be eligible to become diplomates except for their unwillingness to *limit their practice* to just the *field of* ophthalmology."

Now that was believed by whom. By you?

A. It was my understanding.

Q. "Such limitation of practice is one of the requirements for eligibility in the college."

Do you see that?

A. That also was my understanding.

Q. So that notwithstanding this limited area in the supply and demand that we are talking about, you understood that there was further limitation because of the eligibility requirements of ACVO?

A. That was by understanding at that time.

Q. Even though there existed a number of other veterinarians who by experience—what you state as "experience and training" were capable of doing the examinations?

A. That is correct. [RT. 248-249]

• • •

Q. When you say you thought their [non-ACVO's] feelings might be hurt, would you state to the court and jury exactly what it is you mean by that?

A. They might feel that their professional competence had been called into question.

. . .

Q. That if, in fact, there was this agreement, and if, in fact, you were successful in whole or in part in getting these breeders to believe that it would be more difficult to sell their dogs without the certificate and that their peers would look down on them if they didn't have the certificate, that the inability of these non-ACVO people, their competence to conduct these examinations and get the certificate, their competency may be called in question by the breeders and owners?

A. Yes.

Q. You recognized that from the beginning, did you not?

A. I did.

Q. Isn't it also true that, as far as you knew, the ACVO members also understood that?

A. Probably.

. . .

Q. And if when you say their competence would be called in question, their competence as against ACVO members?

A. Correct.

Q. And that question of their competence against ACVO members would only apply in terms of any potential competition between non-ACVO members and ACVO members; isn't that true?

A. That would be a reply, yes.

Q. And if their competence was, in fact, called into question by reason of this agreement and understanding between you and the ACVO members, you recognized, did you not, that some breeders and owners may

not deal with the non-ACVO people whose competence may be put in question?

A. It is a possibility. [RT. 210-211]

3. The Decision to Exclude Non-ACVO's Was Not Unilaterally Made

The Court of Appeals held as a matter of law that:

> CERF's decision to accept canine hereditary eye examination data exclusively from ACVO-certified veterinarians was *unilaterally made*, and was based on considerations of quality control and reliability.

The evidence is clearly to the contrary.

(a) Trial Exhibits of co-founder and chairman of CERF:

(i) No decision of action or policy has been taken by CERF without first discussing the matter with the Liaison Committee and receiving at least the approval of the Committee, if not of the entire ACVO. . . . When the CERF form was approved for universal use by Diplomates at the 1975 ACVO meeting, the agreement was that CERF forms would be furnished by CERF only to ACVO Diplomates; . . . [PX. 219, p. 2, ¶ 3, Letter from Trauner to Demers, 11/24/76]

To make these admissions even more binding, Demers was invited to verify any of the above facts by contacting the current ACVO President, Lionel Rubin. [*Id.*, p. 3, ¶ 4]

(ii) The CERF program was most carefully planned over a 12-month period with ACVO supervision and approval sought at each step. [PX. 254, Letter from Trauner to Holbrook, 3/23/78]

4. Competent and Relevant Evidence From Which a Jury Could Fairly Estimate Damages

The Court of Appeals held as a matter of law that:

> There thus was no competent or relevant evidence from which a jury could fairly estimate damages, [citations omitted], and appellees were thus entitled to judgment on the damages issue as a matter of law.

This finding on the antitrust damage issue cannot be reconciled with not only the evidence, but also with the Court's subsequent finding, in another portion of its opinion, concerning a non-antitrust issue, namely:

> Several dog owners did testify that they would have retained appellants' veterinary services *but for* CERF's requirement that only eye exams performed by ACVO-certified veterinarians would be listed in CERF's registry.

Not only did "several dog owners" so testify, but they also testified as to the *amount* they would have paid the petitioners, but instead were forced to pay to the ACVO's. (RT. 2293-A, 2309, 2292-2293, 2298, 3666-3671, 3607, 3693, 3674, 3718-3719, 3696, 2072, 2078-2081, 2083-2085, 2244, 2253-2254, 2250-2251)

In addition, the petitioners themselves testified as to the proximate number of clients they had to turn away because of the ACVO-CERF agreement, the price they would have charged per dog, and the net profits they would otherwise have made from this business.[1] (RT. 5213, 5268-5270, 5275,

---

[1]On appeal, petitioners raised the issue of the numerous instances in which the Magistrate erroneously excluded damage testimony, including the Magistrate's order to counsel for petitioners not to ask questions which would elicit testimony on dollar amount of damages. This issue was not addressed by respondents' appellate brief and was wholly ignored by the Court of Appeals.

5053, 4551-4553, 4753, 4684-4685, 4691, 5056-5068, 3746-3750, 4048-4051, 3750-3753; PXS. 186 and 246)

Furthermore, the chairman of CERF admitted the following about one of the petitioners:

> Have heard from several owners that they were frustrated and disgusted to learn that the exams done by Carroll Hare, Grant Mohrer, Dr. Custer [petitioner], etc., etc. would not be accepted by CERF . . . but that's the way it has to be. [PX. 186, Letter from Trauner to Africano, 2/16/76]

Moreover, there was record evidence establishing the number of eye-screening examinations sent to CERF by ACVO's. (RT. 4353-4354; PX. 374-A) The ACVO's competing against petitioners Rickards, Custer, Belkin, and Sleasman and the number of examinations they sent to CERF was also established. (PX. 374-A) Likewise, the amount these ACVO's charged per examination was known. (RT. 2040, 2466-2467, 2917, 3671-3673, 4464-4466, 1201-1203, 1375-1376, 1581; PXS. 296 and 298) And there was substantial evidence in the record that this business entailed little or no incremental cost and was thus pure profit. (RT. 3176, 1411, 2091; PX. 207)

5. Without Competition From the Non-ACVO's, the ACVO's Accepted An Invitation to Fix Prices

The Court of Appeals for the Ninth Circuit held as a matter of law that:

> Appellants' price-fixing claim similarly is left unsubstantiated by the record. The record shows that examining veterinarians never discussed fees with CERF, that examination prices charged by the ACVO certified veterinarians ranged from $5.00 to $7.50, and that CERF provided the exam forms free of charge to ACVO veterinarians.

The evidence is clearly to the contrary.

(a) Trial exhibit of co-founder and chairman of CERF to secretary of ACVO

It would be helpful if it could be agreed upon mutually, by ACVO members, that their fees for performing what might be termed "Registry Exams" would be kept as *low as possible in order to attract as many owners as possible, and encourage repeated exams annually in many breeds.* It is becoming generally the custom to charge *$5 per dog when presented at one of the club-sponsored Eye Clinics,* and *I would hope this could be held at this level throughout the country for at least the next couple of years.* The exact *same exam done in the office will have to cost more, I realize, due to overhead, etc. But I would hope that it could be held to $7.50. This is a touchy area, I know.* But *at the same time we should all recognize that if the price seems too high to the owner he simply will not have the dog examined.* [PX. 55, Letter from Trauner to Dr. Gelatt, ACVO's secretary, 9/11/74]

(b) Trial testimony of co-founder and chairman of ACVO

Q. You also suggested, did you not, that these ACVO members should agree upon the price that they'd be charging these breeders and owners for these examinations?

A. I suggested it would be a good idea if they could keep their prices low, standardize them, yes.

Q. By "standardize them," you mean the same or approximately the same?

A. Correct. [RT. 207-208]

• • •

Q. In any event, your suggestion was, was it not, that in the initial stages of effectuating this agreement and understanding between CERF and the individual members of ACVO that the prices should be low in the initial stages?

A. Yes.

Q. To get more acceptance?

A. Right.

Q. And the notion was, after the program became more and more accepted, the prices could be raised?

A. Whatever.

Q. That is what you understood? That is what you are suggesting; isn't it?

A. Everything was, you know, inflation.

Q. Yes, but you were suggesting that, were you not, Ma'am?

A. Yes.

Q. And the reason behind that is that in the initial stages to get the program going, the ACVO members should charge lower prices, but after it became more and more accepted by breeders and owners, and after you were successful in your notion that the breeders and owners would look down on their peers or frown on them, and it would be more difficult to sell their dogs without the certificates, as that became more and more successful, then the ACVO members could raise their prices?

A. That is a thought I had and expressed; yes. [RT. 213-214]

(c) Trial testimony of chairman of ACVO/Liaison Committee

Q. By the way, you charge between five and seven dollars for your eye examinations?

A. That is true.

Q. Do you charge six dollars?

A. It started at five. It had gone up to more like seven and a half. [RT. 2917]

(d) Trial testimony and exhibits showing parallel pricing by ACVO's

Trial testimony and exhibits showed that the ACVO's throughout the United States charged between $5.00 to $7.50 per eye-screening examination from 1975 through 1979. (RT. 2466-2467, 2917, 3671-3673, 4464-4466, 1201-1203, 1375-1376, 1581; PXS. 296 and 298) CERF also advertised ACVO prices and helped set up eye clinics for ACVO's after first informing dog breeders of the fees ACVO's would charge. (PXS. 207 and 206; RT. 2465-2467)

REASONS FOR GRANTING THE WRIT

POINT I

The Decision By the Court of Appeals For the Ninth Circuit Plainly Ignores Decades Of Decisions By This Court On the Elements Necessary To Prove a Conspiracy and Damages in Antitrust Cases, Threatens the Public Policy Behind the Private Enforcement of the Antitrust Laws, Subjects Private Antitrust Plaintiffs To the Uncertainty Of Whether the Established Law Will Be Followed, and Fosters Further Miscarriages of Justice By Substituting Ad Hoc Interpretations For the Settled Principles Of Law Previously Stated By This Court

By any reasonable interpretation, the quantum of evidence showing the existence of a conspiracy in this case far exceeds that found in the leading cases by this Court defining the law of conspiracy.

The applicable standards of necessary proof to establish a conspiracy were concisely summarized in two historic decisions by this Court. Each of those cases was a criminal case brought by the United States against the defendants. In each case, the government was required to prove the alleged conspiracy *beyond a reasonable doubt,* a standard which is far more strict than the measure of proof required in the case at bar. In each case, this Court affirmed the findings of conspiracy.

In *Interstate Circuit v. United States,* 306 U.S. 209, 226-227 (1939), this Court held:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [Citations omitted] Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. [Citations omitted]

Later, in *American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946), this Court held:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may in themselves be wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a

> matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. [Citation omitted] Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that conspiracy is established is justified.

Applying these standards, and viewing the evidence in the light most favorable to the petitioners pursuant to *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), the petitioners have presented clear, credible evidence of the existence of a conspiracy to exclude the petitioners, monopolize the market and increase prices. The conclusion by the Court of Appeals that there was "insufficient evidence of an agreement" could only be reached by completely ignoring the undisputed evidence in this record and the binding precedents of this Court.

Like the relatively small competitor in *Montague & Co. v. Lowrey*, 193 U.S. 38 (1905) who was excluded from doing business as he had done before the formation of an association to exclude non-members, the business of these petitioners and their freedom to compete on the merits was restrained. These petitioners, like any other independent competitors excluded by an association of competitors, had

the right, but were denied the right, to rely upon this Court's previous decisions.

Further, the *Montague* case, *supra,* which is virtually identical to the case at bar, indisputably compels a different result than that reached by the Ninth Circuit. Nor was the *Montague* case *sui generis.* Since that early case, this Court has repeatedly condemned such exclusionary business tactics, irrespective of how small the excluded competitor may have been or how unimportant his survival may have been to the general economy. *Radovich v. National Football League,* 352 U.S. 445 (1957), *Klor's v. Broadway Hale,* 359 U.S. 207 (1959), *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,* 364 U.S. 656 (1961).

Even if this Court believes that there should be a retreat from this Court's prior decisions and precedents, the writ should be granted to correct the confusion and ambiguity now caused by the Ninth Circuit's decision. Otherwise, the various Circuit Courts of Appeal may establish new and different standards as to what constitutes acceptable proof of the existence of a conspiracy, as the Ninth Circuit has done.

Finally, if the decision by the Ninth Circuit is not reviewed, then, in light of the record evidence in this case, nothing short of a written agreement will suffice to create a jury question on the existence of a conspiracy. At the very least, antitrust defendants will so argue if the Ninth Circuit's opinion remains unchecked by this Court.

POINT II

The Ninth Circuit's Opinion With Respect to the Question Of What Constitutes Permissible and Competent Proof of Antitrust Damages Represents an Abrupt Departure From Accepted Standards for Proof of Damages Enunciated by This Court

Measured against the evidence and authority presented in this petition, the Ninth Circuit opinion clearly confounds the state of the law with respect to the sufficiency and the type of evidence necessary to prove antitrust damages. It is not clear whether the Ninth Circuit is enunciating a new standard for proof of antitrust damages which bars opinion testimony by antitrust plaintiffs and mandates expert testimony; or whether a *de minimis* standard for antitrust damages is being interposed so that customer testimony proving dollar damages in some amount is no longer a sufficient measure of damages. Accordingly, guidance from this Court is necessary on the important and currently unresolved question of what constitutes permissible and competent damage evidence in antitrust cases.

The Ninth Circuit's treatment of the proof of damages issue in the case at bar is in direct conflict with the venerable and long-recognized rule that the wrongdoer must bear the risk of uncertainty as to proof of the amount of damages suffered by plaintiffs. *Eastern Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 376-378 (1927); *Storey Parchment Co. v. Patterson Paper*, 282 U.S. 555 (1930).

These cases uphold an expansive standard for proof of fact and amount of damages. But the Ninth Circuit opinion

nullifies these decisions and shifts the benefit of the relaxed rule for proof of amount of damages from plaintiffs to defendants in antitrust cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DATED: September 26, 1983

(Appendices follow)

Appendix A

[¶ 65,355] D. A. Rickards, M. A. Custer, Paul V. Belkin, and John S. Sleasman v. Canine Eye Registration Foundation, Inc., Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton, Alan D. MacMillan, Dennis D. Olin, Randall H. Scagliotti, and Ralph C. Vierheller.

U.S. Court of Appeals, Ninth Circuit. No. 81-4668. Filed May 3, 1983. Appeal from U. S. District Court, Northern District of California.

OPINION

KEEP, D. J.: On October 31, 1979, plaintiffs (hereinafter referred to as appellants) filed a complaint seeking damages and injunctive relief, alleging that defendants (hereinafter referred to as appellees) violated both the Sherman Act, 15 U. S. C. §§ 1-2 (1976) and various California antitrust laws,[1] and committed the commonlaw tort of intentional interference with prospective economic advantage. The parties stipulated to trial before a magistrate. On June 22, 1981, two days before trial, the magistrate heard appellees' motions *in limine* and for summary judgment. Appellees' motion *in limine*, requesting an order precluding appellants from offering at trial testimony from experts not designated in the "Joint Pretrial Statement," was granted. In light of his ruling on the motion *in limine*, the magistrate then granted appellees' summary judgment motion as to the antitrust damages claims.

On June 24, 1981, the case proceeded to trial on the antitrust claims for injunctive relief and the common-law interference with prospective economic advantage claim.

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[1]Cal. Bus. & Prof. Code §§ 16700—16703 (West 1964 & Supp. 1982); *Id.* §§ 16720—16727.

The common law claim was tried to a jury sitting in an advisory capacity, and the injunctive claims were tried to the magistrate. After appellants concluded their presentation of evidence, appellees moved for a directed verdict on the common law claim pursuant to Fed. R. Civ. P. 50(a), and dismissal of the injunctive claims pursuant to Fed. R. Civ. P. 41(b). The magistrate granted both motions. We affirm.

I. *Facts*

The Canine Eye Registration Foundation ("CERF") is a non-profit, tax-exempt, charitable organization. None of CERF's officers or directors is a veterinarian. According to its constitution, CERF's purpose is to collect, collate, and disseminate information concerning hereditary eye diseases in dogs by establi hing a registry listing purebred dogs of those breeds that are susceptible to hereditary eye diseases. CERF requires dogs to be examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("ACVO") before listing the dogs in its registry. ACVO members evaluate the dogs using forms provided by CERF. The ACVO veterinarian then returns one copy of the form to CERF, and, if the owner remits the original to CERF with a $5.00 registration fee, CERF issues to the owner a certificate indicating whether the dog suffers from hereditary eye defects. Regardless of whether the owner sends the original and the fee to CERF, the information from the examining veterinarian is tabulated and made available to dog breeders and researchers around the country.

Veterinarians wishing to become ACVO-certified specialists in veterinary ophthalmology must pass a series of

tests devised by ACVO under general guidelines established by the American Veterinary Medical Association.[2] The applicant first presents his or her credentials to ACVO. If the applicant's qualifications meet ACVO's Credential Committee's standards, the applicant must then take and pass written, oral, and practical qualifying exams before receiving ACVO certification. Approximately 84% of the applicants are ultimately certified.

Appellants herein are veterinarians who could not or did not pass ACVO's certification exams,[3] and thus could not perform canine eye examinations that CERF would list in its registry. The thrust of appellants' complaint is that through a combination or conspiracy between ACVO and CERF, appellants were precluded from performing eye-screening examinations. They allege CERF and ACVO engaged in a group boycott, and an illegal tying arrangement whereby the issuance of a CERF Registration Certificate was tied to the use of the CERF form and the examination performed by a member of ACVO. Appellants also allege

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[2]The American Veterinary Medical Association ("AVMA") is a veterinary professional society. It recognizes other societies that represent various groups of veterinary medicine specialists. One such specialty is ACVO. AVMA recognizes no other group in the area of veterinary ophthalmology.

[3]All of the appellants are veterinarians. Dr. D. A. Rickards has practiced in Cleveland, Ohio since 1963. He sat for ACVO's written exam seven times and failed each time. Dr. Paul Belkin has practiced in St. Louis since 1952. His credentials were rejected by ACVO's Credential Committee in 1975. He has not resubmitted his credentials although invited to do so. Dr. M. A. Custer has practiced in San Diego since 1959, and Dr. John S. Sleasman has practiced in Washington since 1973. Neither Dr. Custer nor Dr. Sleasman has ever applied for ACVO membership.

that appellees engaged in price-fixing since all ACVO members performing eye-screening exams charged between $5.00 and $7.50, allegedly at the suggestion of CERF. Appellants claim that defendants combined and conspired to prevent others from establishing canine eye registries to monopolize the market in eye-screening examinations. Appellees allegedly engaged in the following exclusionary practices: preventing nonmembers of ACVO from performing the eye exams and falsely implying that nonspecialists were not as competent as ACVO certified ophthalmologists. Finally, appellants claim the above mentioned conduct violated California unfair competition laws and constituted an intentional interference with prospective business advantage.

II. *Discussion*

Appellants raise three issues before this Court. They first argue that the magistrate improperly granted appellees' motion for summary judgment on the antitrust damages claim. After viewing the record in its entirety, we hold that summary judgment was properly granted. Even though summary judgment is not particularly favored in antitrust litigation, *Poller v. CBS* [1962 TRADE CASES ¶ 70,228], 368 U. S. 464, 467, 473 (1962); *Blair Foods, Inc. v. Ranchers Cotton Oil* [1980-1 TRADE CASES ¶ 63,104], 610 F. 2d 665, 668 (9th Cir. 1980), summary judgment was properly granted here. At the time the motion was filed, less than two weeks before trial, appellants had neither identified their expert witnesses nor designated documents supporting their damages claims. There thus was no competent or relevant evidence from which a jury could fairly estimate damages, see *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.* [1979-1 TRADE CASES ¶ 62,527],

467 F. Supp. 841, 863 (N. D. Cal. 1979), aff'd *sub nom. Murphy Tugboat Co. v. Crowley* [1981-1 TRADE CASES ¶ 64,000], 658 F. 2d 1256 (9th Cir. 1981), and appellees were thus entitled to judgment on the damages issue as a matter of law. See *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.* [1980-81 TRADE CASES ¶ 63,854], 637 F. 2d 1376, 1381 (9th Cir.), cert. denied, 454 U. S. 831 (1981).

Appellants next argue that the magistrate improperly granted appellees' motions to dismiss the antitrust injunctive claims and for a directed verdict on the common-law claim of tortious interference with prospective economic advantage. We discuss these in turn.

A. *The Motion to Dismiss.*

At the close of appellants' case, appellees brought a motion to dismiss pursuant to Rule 41(b)[4] which was granted. When a trial court finds against the plaintiff on a Rule 41(b) motion, it is required to make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).[5]

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[4]Fed. R. Civ. P. 41(b) provides in part that "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

[5]Fed. R. Civ. P. 52(a) provides in part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Appellants claim here that they are entitled to a *de novo* review of the facts because the magistrate adopted findings drafted and submitted by the appellees. The fact that the magistrate adopts findings prepared by the prevailing party does not by itself necessitate a *de novo* review; however, the magistrate's findings will be more carefully scrutinized in such cases. *Photo Electronics Corp. v. England,* 581 F. 2d 772, 777 (9th Cir. 1978). The clearly erroneous standard still applies, and this Court will overturn the magistrate's findngs only if the record firmly convinces us that a mistake has been made.

1. *The Sherman Act Section 1 violations.*

In granting the motion to dismiss, the magistrate first concluded that appellants demonstrated no right to relief under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1976).[6] Appellants contend that they proffered evidence substantiating group boycott, price-fixing, and tie-in claims which constitute per se violations of Section 1. We reject this contention. To prove a violation of Section 1, appellants must show a contract, combination, or conspiracy in restraint of trade. On the record before this Court there is insufficient evidence of an agreement. CERF's decision to accept canine hereditary eye examination data exclusively from ACVO-certified veterinarians was unilaterally made, and was based on considerations of qualify control and reliability. It is true that ACVO formed a committee to provide scientific information to CERF because CERF's officers and directors are lay persons, and, that prior to its incorporation, CERF consulted ACVO on the feasibility of an eye

[6] 15 U. S. C. § 1 provides in part that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

registry. There was, however, no evidence that ACVO participated in either the formulation of CERF policy or the drafting of CERF's constitution. In fact, once CERF publicized its decision to limit its registry to examination data prepared by ACVO members, some ACVO members voiced their disapproval. There was an understanding between ACVO and CERF that ACVO would supply CERF scientific information and guidance on medical issues but this understanding does not rise to the level of an agreement violative of Section 1 of the Sherman Act.

Even if there were sufficient evidence of an agreement, the record before us demonstrates that the "agreement" amounts to nothing more than a type of exclusive dealership agreement: CERF provided examination forms only to ACVO members and would accept no other type of form for inclusion in its registry. The reason justifying this CERF-ACVO relationship is valid. ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform the hereditary eye examinations. Obviously, examination reliability is of utmost concern to CERF.

This type of exclusive dealership arrangement, without more, is not violative of Section 1 of the Sherman Act. As the court stated in *Determined Productions, Inc. v. R. Dakin & Co.* [1980-1 TRADE CASES ¶ 63,063], 514 F. Supp. 645, 646 (N. D. Cal. 1979), aff'd mem., 649 F. 2d 866 (9th Cir. 1981):

> We must begin with the well-settled proposition that a trader has the right to deal or refuse to deal with whomever he pleases for reasons sufficient to himself. [citations omitted] A refusal to deal is not unlawful unless it implements an arrangement to restrain trade

by, for example, enforcing price maintenance, barring a competitor from a market or maintaining a dominant market position.

See, *Bushie v. Stenocord* [1972 Trade Cases ¶ 73,896], 460 F. 2d 116, 119 (9th Cir. 1972).

In *GTS Sylvania, Inc. v. Continental T. V., Inc.* [1976-1 Trade Cases ¶60,848], 537 F. 2d 980, 997 (9th Cir. 1976) (en banc), aff'd, [1977-1 Trade Cases ¶61,488], 433 U. S. 36 (1977), this Court noted that "[t]here is a veritable avalanche of precedent" holding that execlusive dealing, without more, does not show a violation of the antitrust laws. The record demonstrates that CERF's policy of providing examination forms exclusively to ACVO members and accepting results only from them, is nothing more than a form of exclusive dealership. Accordingly, the magistrate's conclusion that CERF and ACVO did not enter into an agreement violative of Section 1 of the Sherman Act is correct.

Since there was no agreement between CERF and ACVO members to exclude nonmembers, there is nothing in the record supporting appellants' group boycott theory. A claim of concerted refusal to deal obviously cannot stand without evidence of concert. *Cleary v. National Distillers & Chemical Corp.* [1974-2 Trade Cases ¶57,332], 505 F. 2d 695, 697 (9th Cir. 1974) (per curiam). An individual distributor acting alone has the right to deal with whomever he pleases. *Id.*

Appellants' price-fixing claim similarly is left unsubstantiated by the record. The record shows that examining veterinarians never discussed fees with CERF, that examination prices charged by the ACVO-certified veterinari-

ans ranged from $5.00 to $7.50, and that CERF provided the exam forms free of charge to ACVO veterinarians. Although CERF directors apparently made several inquiries regarding fees, the inquiries were unanswered. Isolated requests for price information, however, do not a price-fixing claim make, *Krehl v. Baskin-Robbins Ice Cream Co.* [1982-1 TRADE CASES ¶64,449], 664 F. 2d 1348, 1357 (9th Cir. 1982), and the magistrate was thus justified in granting the motion to dismiss the price-fixing claim.

Finally, appellants' tie-in theory must likewise be rejected. Appellants contend that appellees "tied" the issuance of a CERF Registration Certificate to the use of a CERF Examination Form and service by an ACVO member. To establish an unlawful tying arrangement, appellants must offer proof that there are two separate products, and that the sale of one (the typing product) has been conditioned upon the purchase of the other (the tied product). *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶67,494], 345 U. S. 594, 613-14 (1953); *Krehl v. Baskin-Robbins Ice Cream Co.* [1982-1 TRADE CASES ¶64,449], 664 F. 2d at 1352; *Siegel v. Chicken Delight, Inc.* [1971 TRADE CASES ¶73-703], 448 F. 2d 43, 47 (9th Cir. 1971), cert. denied, 405 U. S. 955 (1972). In examining a tie-in claim, this Court must consider whether the seller of the tying product (the CERF certificate) harbors an economic interest in the tied product (the use of the CERF examination form and the performance of services by an ACVO member). *Moore v. Jas. H. Matthews & Co.* [1977-1 TRADE CASES ¶61,376], 550 F. 2d 1207, 1216 (9th Cir. 1977 The CERF examination forms were provided to the veterinarians free of charge. The fee charged by the veterinarians

did not benefit CERF in any way. From the state of the record, the magistrate correctly ruled that CERF, the seller of the tying product, harbored no economic interest in the tied product.

In sum, we hold that the magistrate properly granted appellees' motion to dismiss. The record fails to support appellants' contentions that the parties entered into an "agreement" violative of Section 1 of the Sherman Act. Appellants' group boycott, price-fixing and tie-in claims are unsubstantiated by the record. We next turn to appellants' Section 2 claim.

2. *The Sherman Act Section 2 violations.*

Under Section 2 of the Sherman Act, 15 U. S. C. § 2 (1976),[7] appellants carry the burden of showing: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *California Computer Products v. IBM* [1979-1 Trade Cases ¶62-713], 613 F. 2d 727, 736 (9th Cir. 1979). Appellants' claim fails on the first requirement. There is no evidence of specific intent to control prices or destroy competition. While specific intent may be inferred from substantial anticompetitive conduct, *Forro Precision, Inc. v. IBM* [1982-1 Trade Cases ¶64,708], 673 F. 2d 1045, 1059 (9th Cir. 1982), the record in the instant case reveals procompetitive conduct. Setting minimum standards to insure quality increases competition and is entirely reasonable.

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[7] 15 U. S. C. § 2 provides in part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

This Court's opinion in *Deesen v. The Professional Golfers' Association of America* [1966 TRADE CASES ¶ 71,706], 358 F. 2d 165 (9th Cir. 1966) cert. denied 385 U. S. 846 (1966) is instructive. In *Deesen*, plaintiff, a professional golfer, claimed that defendants engaged in a combination or conspiracy to monopolize professional golf tournaments and to boycott him. The PGA maintained proficiency requirements for players wishing to enter PGA tournaments. The requirements were justified by the PGA's interests in fostering competition and in preventing tournament overburdening by players of inferior ability. The court found the PGA's conduct entirely reasonable. Just as the PGA set certain requirements to insure high quality golf tournaments, CERF established objective criteria to measure competence in the field of veterinary ophthalmology. Just as the PGA treated all golfers similarly, CERF applied its policy in an even-handed manner. In both cases, the conduct complained of was procompetitive and not anticompetitive. Thus, with neither direct nor inferential evidence of specific intent to monopolize, appellants' Section 2 claim must fall. The facts are plainly insufficient to support the claim, and it is therefore unnecessary to consider the other Section 2 requirements. The dismissal of all the antitrust claims was clearly warranted.[8]

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[8]Appellants' state-law claims under the California Business & Professions Code see, footnote 1, *supra*, must be rejected as well. The finding that appellees' conduct is reasonable under the Sherman Act precludes recovery under state law in this instance. See *Bridge Corp. of America v. The American Contract Bridge League Inc.* [1970 TRADE CASES ¶ 73,256], 428 F. 2d 1365, 1371 (9th Cir. 1970).

B. *The Directed Verdict*

In considering whether the magistrate properly granted appellees' motion for directed verdict, pursuant to Fed. R. Civ. P. 50(a), this Court must determine, by viewing the evidence as a whole, whether appellants presented substantial evidence that could support a finding in their favor by reasonable jurors. *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.* [1974-1 TRADE CASES ¶ 75,096], 498 F. 2d 1137, 1140 (9th Cir. 1974). If appellants fail to present sufficient evidence, the court must direct a verdict in appellees' favor. *Id.*

The magistrate directed a verdict on the tortious interference with prospective economic advantage claim. To prevail on this pendent state-law claim, appellants must establish: (1) the existence of a specific economic relationship between appellants and third parties that may economically benefit appellants; (2) knowledge by the appellees of this relationship; (3) intentional acts by the appellees designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the appellants. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827, 537 P. 2d 865, 872, 122 Cal. Rptr. 745, 752 (1975). Some identifiable pecuniary or economic benefit must accrue to appellees that formerly accrued to appellants, *De Voto v. Pacific Fidelity Life Insurance Co.* [1980-1 TRADE CASES ¶ 63,280], 618 F. 2d 1340, 1348 (9th Cir.), cert. denied, 449 U. S. 869 (1980).

Viewing the evidence as a whole, we conclude that several elements of the tortious interference claim were not established, and that the directed verdict was properly granted. First, the evidence fails to support appellants' claim that creation of CERF's canine eye registry disrupted an on-

going economic relationship between appellants and third parties. Several dog owners did testify that they would have retained appellants' veterinary services but for CERF's requirement that only eye exams performed by ACVO-certified veterinarians would be listed in CERF's registry. Appellants argue that this testimony constitutes evidence of specific economic relationships that were disrupted by appellees' conduct. We disagree. The evidence only demonstrates that some owners chose not to retain appellants. Appellants' regular clients sought appellants' veterinary services before and after creation of CERF's registry system and thus the evidence does not show that an *ongoing* business relationship between appellants and their regular clients was somehow disrupted. Further, because appellants did not perform genetic eye-screening exams for purposes of an eye registry, CERF's registry system did not interfere with appellants' specific business relations.

Second, the record is devoid of evidence indicating that appellees intended to disrupt appellants' business relationships with their clients. Appellants state in their reply brief that appellees "knew or should have known" of the economic relationships between appellants and third persons, and that appellees "committed intentional acts designed to disrupt business relationships between non-ACVO plaintiffs and their customers and prospective customers". Appellants' Reply Brief, p. 5. Proof of these claims, however, does not reasonably support a finding that appellees intended to disrupt appellants' business relationships with third persons. Motive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case, *Lowell v. Mother's Cake and Cookie Co.*,

[1978-1 TRADE CASES ¶ 62,003], 79 Cal. App. 3d 13, 18, 144 Cal. Rptr. 664, 668 (1978), and a strong showing of intent is required to establish liability. As we said in *De Voto v. Pacific Fidelity Life Insurance Co.* [1980-1 TRADE CASES ¶ 63,280], 618 F. 2d at 1347:

> Tortious interference requires a state of mind and a purpose more culpable than the "intent" under the Restatement definition, however. The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into the motive or purpose of the actor is necessary. . . . Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly. The extent of liability, for this tort, is fixed in part by the motive or purpose of the actor.

Appellees' conduct is neither criminal nor fraudulent and no aggravating circumstances appear in the record. The record is devoid of *direct* evidence of improper motive or purpose and we will not *infer* such motive merely because appellees "should have known" that creation of their registry injured appellants' business dealings. Further, it is our conclusion that appellees' motive in creating the canine eye registry was proper. CERF's requirement that ACVO-certified veterinarians administer the eye exams was motivated neither by the desire to disrupt appellants' business relations nor by an improper concern for economic reward. Instead, the requirement merely ensures that qualified individuals perform the eye examinations. The proffered evidence thus fails to establish intent to injure appellants' business relations.

Finally, appellants failed to present competent evidence to prove damages. As previously discussed, appellants' damages proof was speculative at best. And since proof of the nature and extent of damages must be reasonably certain before recovery is warranted, *Lucky Auto Supply v. Turner,* 244 Cal. App. 2d 872, 883, 53 Cal. Rptr. 628, 634 (1966), appellants' interference with prospective economic advantage claim falls on the damages issue as well.

Viewing the record as a whole, the magistrate was not presented with substantial evidence supporting a finding by reasonable jurors in appellants' favor. Appellants failed to establish several elements of their intentional interference with prospective economic advantage claim, and thus the motion for directed verdict was properly granted.

Accordingly, the magistrate's rulings are hereby Affirmed.

Appendix A-1

United States Court of Appeals
for the Ninth Circuit

No. 81-4668

D.C. No. C-79-3053

D. A. Rickards, M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs/appellants,

vs.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton,
Alan D. MacMillan, Dennis D. Olin, Randall H. Scagliotti
and Ralph C. Vierheller,
Defendants/appellees,

Appeal from the United States District Court
for the Northern District of California
Hon. Owen E. Woodruff, Magistrate, Presiding
Argued and Submitted October 13, 1982

Before: DUNIWAY and BOOCHEVER, Circuit Judges and
KEEP, District Judge.*

[Filed May 3, 1983]

KEEP, District Judge:

OPINION

On October 31, 1979, plaintiffs (hereinafter referred to as appellants) filed a complaint seeking damages and injunctive relief, alleging that defendants (hereinafter

*Honorable Judith N. Keep, District Judge for the Southern District of California, sitting by designation.

referred to as appellees) violated both the Sherman Act, 15 U.S.C. §§ 1-2 (1976) and various California antitrust laws,[1] and committed the common-law tort of intentional interference with prospective economic advantage. The parties stipulated to trial before a magistrate. On June 22, 1981, two days before trial, the magistrate heard appellees' motions *in limine* and for summary judgment. Appellees' motion *in limine*, requesting an order precluding appellants from offering at trial testimony from experts not designated in the "Joint Pretrial Statement," was granted. In light of his ruling on the motion *in limine*, the magistrate then granted appellees' summary judgment motion as to the antitrust damages claims.

On June 24, 1981, the case proceeded to trial on the antitrust claims for injunctive relief and the common-law interference with prospective economic advantage claim. The common law claim was tried to a jury sitting in an advisory capacity, and the injunctive claims were tried to the magistrate. After appellants concluded their presentation of evidence, appellees moved for a directed verdict on the common law claim pursuant to Fed. R. Civ. P. 50(a), and dismissal of the injunctive claims pursuant to Fed. R. Civ. P. 41(b). The magistrate granted both motions. We affirm.

I. FACTS

The Canine Eye Registration Foundation ("CERF") is a non-profit, tax-exempt, charitable organization. None of CERF's officers or directors is a veterinarian. According to its constitution, CERF's purpose is to collect, collate, and disseminate information concerning hereditary eye diseases in dogs by establishing a registry listing pure-

bred dogs of those breeds that are susceptible to hereditary eye diseases. CERF requires dogs to be examined by veterinarians certified by the American College of Veterinary Ophthalmologists ("ACVO") before listing the dogs in its registry. ACVO members evaluate the dogs using forms provided by CERF. The ACVO veterinarian then returns one copy of the form to CERF, and, if the owner remits the original to CERF with a $5.00 registration fee, CERF issues to the owner a certificate indicating whether the dog suffers from hereditary eye defects. Regardless of whether the owner sends the original and the fee to CERF, the information from the examining veterinarian is tabulated and made available to dog breeders and researchers around the country.

Veterinarians wishing to become ACVO-certified specialists in veterinary ophthalmology must pass a series of tests devised by ACVO under general guidelines established by the American Veterinary Medical Association. The applicant first presents his or her credentials to ACVO. If the applicant's qualifications meet ACVO's Credential Committee's standards, the applicant must then take and pass written, oral, and practical qualifying exams before receiving ACVO certification. Approximately 84% of the applicants are ultimately certified.

Appellants herein are veterinarians who could not or did not pass ACVO's certification exams, and thus could not perform canine eye examinations that CERF would list in its registry. The thrust of appellants' complaint is that through a combination or conspiracy between ACVO and CERF, appellants were precluded from performing eye-screening examinations. They allege CERF and ACVO

engaged in a group boycott, and an illegal tying arrangement whereby the issuance of a CERF Registration Certificate was tied to the use of the CERF form and the examination performed by a member of ACVO. Appellants also allege that appellees engaged in price-fixing since all ACVO members performing eye-screening exams charged between $5.00 and $7.50, allegedly at the suggestion of CERF. Appellants claim that defendants combined and conspired to prevent others from establishing canine eye registries to monopolize the market in eye-screening examinations. Appellees allegedly engaged in the following exclusionary practices: preventing non-members of ACVO from performing the eye exams and falsely implying that non-specialists were not as competent as ACVO certified ophthalmologists. Finally, appellants claim the above mentioned conduct violated California unfair competition laws and constituted an intentional interference with prospective business advantage.

II. DISCUSSION

Appellants raise three issues before this Court. They first argue that the magistrate improperly granted appellees' motion for summary judgment on the antitrust damages claim. After viewing the record in its entirety, we hold that summary judgment was properly granted. Even though summary judgment is not particularly favored in antitrust litigation, *Poller v. CBS*, 368 U.S. 464, 467, 473 (1962); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 (9th Cir. 1980), summary judgment was properly granted here. At the time the motion was filed, less than two weeks before trial, appellants had neither identified their expert witnesses nor designated documents support-

ing their damages claims. There thus was no competent or relevant evidence from which a jury could fairly estimate damages, *see Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 863 (N.D. Cal. 1979), *aff'd sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), and appellees were thus entitled to judgment on the damages issue as a matter of law. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

Appellants next argue that the magistrate improperly granted appellees' motions to dismiss the antitrust injunctive claim and for a directed verdict on the common-law claim of tortious interference with prospective economic advantage. We discuss these in turn.

A. *The Motion to Dismiss.*

At the close of appellants' case, appellees brought a motion to dismiss pursuant to Rule 41(b) which was granted. When a trial court finds against the plaintiff on a Rule 41(b) motion, it is required to make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). Appellants claim here that they are entitled to a *de novo* review of the facts because the magistrate adopted findings drafted and submitted by the appellees. The fact that the magistrate adopts findings prepared by the prevailing party does not by itself necessitate a *de novo* review; however, the magistrate's findings will be more carefully scrutinized in such cases. *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). The clearly erroneous standard still applies, and this Court will over-

turn the magistrate's findings only if the record firmly convinces us that a mistake has been made.

1. *The Sherman Act Section 1 violations.*

In granting the motion to dismiss, the magistrate first concluded that appellants demonstrated no right to relief under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Appellants contend that they proffered evidence substantiating group boycott, price-fixing, and tie-in claims which constitute per se violations of Section 1. We reject this contention. To prove a violation of Section 1, appellants must show a contract, combination, or conspiracy in restraint of trade. On the record before this Court there is insufficient evidence of an agreement. CERF's decision to accept canine hereditary eye examination data exclusively from ACVO-certified veterinarians was unilaterally made, and was based on considerations of quality control and reliability. It is true that ACVO formed a committee to provide scientific information to CERF because CERF's officers and directors are lay persons, and, that prior to its incorporation, CERF consulted ACVO on the feasibility of an eye registry. There was, however, no evidence that ACVO participated in either the formulation of CERF policy or the drafting of CERF's constitution. In fact, once CERF publicized its decision to limit its registry to examination data prepared by ACVO members, some ACVO members voiced their disapproval. There was an understanding between ACVO and CERF that ACVO would supply CERF scientific information and guidance on medical issues but this understanding does not rise to the level of an agreement violative of Section 1 of the Sherman Act.

Even if there were sufficient evidence of an agreement, the record before us demonstrates that the "agreement" amounts to nothing more than a type of exclusive dealership agreement: CERF provided examination forms only to ACVO members and would accept no other type of form for inclusion in its registry. The reason justifying this CERF-ACVO relationship is valid. ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform the hereditary eye examinations. Obviously, examination reliability is of utmost concern to CERF.

This type of exclusive dealership arrangement, without more, is not violative of Section 1 of the Sherman Act. As the court stated in *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F.Supp. 645, 646 (N.D. Cal. 1979), *aff'd mem.*, 649 F.2d 866 (9th Cir. 1981):

> We must begin with the well-settled proposition that a trader has the right to deal or refuse to deal with whomever he pleases for reasons sufficient to himself. [citations omitted] A refusal to deal is not unlawful unless it implements an arrangement to restrain trade by, for example, enforcing price maintenance, barring a competitor from a market or maintaining a dominant market position. *See, Bushie v. Stenocord*, 460 F.2d 116, 119 (9th Cir. 1972).

In *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977), this Court noted that "[t]here is a veritable avalanche of precedent" holding that exclusive dealing, without more, does not show a violation of the antitrust laws. The record demonstrates that CERF's policy of providing examination forms exclusively to ACVO members and accepting results

only from them, is nothing more than a form of exclusive dealership. Accordingly, the magistrate's conclusion that CERF and ACVO did not enter into an agreement violative of Section 1 of the Sherman Act is correct.

Since there was no agreement between CERF and ACVO members to exclude nonmembers, there is nothing in the record supporting appellants' group boycott theory. A claim of concerted refusal to deal obviously cannot stand without evidence of concert. *Cleary v. National Distillers & Chemical Corp.*, 505 F.2d 695, 697 (9th Cir. 1974) (per curiam). An individual distributor acting alone has the right to deal with whomever he pleases. *Id.*

Appellants' price-fixing claim similarly is left unsubstantiated by the record. The record shows that examining veterinarians never discussed fees with CERF, that examination prices charged by the ACVO-certified veterinarians ranged from $5.00 to $7.50, and that CERF provided the exam forms free of charge to ACVO veterinarians. Although CERF directors apparently made several inquiries regarding fees, the inquiries were unanswered. Isolated requests for price information, however, do not a price-fixing claim make, *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982), and the magistrate was thus justified in granting the motion to dismiss the price-fixing claim.

Finally, appellants' tie-in theory must likewise be rejected. Appellants contend that appellees "tied" the issuance of a CERF Registration Certificate to the use of a CERF Examination Form and service by an ACVO member. To establish an unlawful tying arrangement, appellants must offer proof that there are two separate products,

and that the sale of one (the tying product) has been conditioned upon the purchase of the other (the tied product). *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 613-14 (1953); *Krehl v. Baskin-Robbins Ice Cream* Co., 664 F.2d at 1352; *Siegel v. Chicken Delight, Inc.,* 448 F.2d 43, 47 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972). In examining a tie-in claim, this Court must consider whether the seller of the tying product (the CERF certificate) harbors an economic interest in the tied product (the use of the CERF examination form and the performance of services by an ACVO member). *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1216 (9th Cir. 1977). The CERF examination forms were provided to the veterinarians free of charge. The fee charged by the veterinarians did not benefit CERF in any way. From the state of the record, the magistrate correctly ruled that CERF, the seller of the tying product, harbored no economic interest in the tied product.

In sum, we hold that the magistrate properly granted appellees' motion to dismiss. The record fails to support appellants' contentions that the parties entered into an "agreement" violative of Section 1 of the Sherman Act. Appellants' group boycott, price-fixing and tie-in claims are unsubstantiated by the record. We next turn to appellants' Section 2 claim.

2. *The Sherman Act Section 2 violations.*

Under Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), appellants carry the burden of showing: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive con-

duct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *California Computer Products v. IBM,* 613 F.2d 727, 736 (9th Cir. 1979). Appellants' claim fails on the first requirement. There is no evidence of specific intent to control prices or destroy competition. While specific intent may be inferred from substantial anticompetitive conduct, *Forro Precision, Inc. v. IBM,* 673 F.2d 1045, 1059 (9th Cir. 1982), the record in the instant case reveals pro-competitive conduct. Setting minimum standards to insure quality increases competition and is entirely reasonable.

This Court's opinion in *Deesen v. The Professional Golfers' Association of America,* 358 F.2d 165 (9th Cir. 1966) *cert. denied,* 385 U. S. 846 (1966) is instructive. In *Deesen,* plaintiff, a professional golfer, claimed that defendants engaged in a combination or conspiracy to monopolize professional golf tournaments and to boycott him. The PGA maintained proficiency requirements for players wishing to enter PGA tournaments. The requirements were justified by the PGA's interests in fostering competition and in preventing tournament overburdening by players of inferior ability. The court found the PGA's conduct entirely reasonable. Just as the PGA set certain requirements to insure high quality golf tournaments, CERF established objective criteria to measure competence in the field of veterinary ophthalmology. Just as the PGA treated all golfers similarly, CERF applied its policy in an even-handed manner. In both cases, the conduct complained of was pro-competitive and not anticompetitive. Thus, with neither direct nor inferential evidence of specific intent to monopolize, appellants' Section 2 claim must fall. The facts are plainly insufficient to support the claim, and it is there-

fore unnecessary to consider the other Section 2 requirements. The dismissal of all the antitrust claims was clearly warranted.

B. *The Directed Verdict.*

In considering whether the magistrate properly granted appellees' motion for directed verdict, pursuant to Fed. R. Civ. P. 50(a), this Court must determine, by viewing the evidence as a whole, whether appellants presented substantial evidence that could support a finding in their favor by reasonable jurors. *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir. 1974). If appellants fail to present sufficient evidence, the court must direct a verdict in appellees' favor. *Id.*

The magistrate directed a verdict on the tortious interference with prospective economic advantage claim. To prevail on this pendent state-law claim, appellants must establish: (1) the existence of a specific economic relationship between appellants and third parties that may economically benefit appellants; (2) knowledge by the appellees of this relationship; (3) intentional acts by the appellees designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the appellants. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827, 537 P.2d 865, 872, 122 Cal.Rptr. 745, 752 (1975). Some identifiable pecuniary or economic benefit must accrue to appellees that formerly accrued to appellants, *De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1348 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

Viewing the evidence as a whole, we conclude that several elements of the tortious interference claim were not

established, and that the directed verdict was properly granted. First, the evidence fails to support appellants' claim that creation of CERF's canine eye registry disrupted an ongoing economic relationship between appellants and third parties. Several dog owners did testify that they would have retained appellants' veterinary services but for CERF's requirement that only eye exams performed by ACVO-certified veterinarians would be listed in CERF's registry. Appellants argue that this testimony constitutes evidence of specific economic relationships that were disrupted by appellees' conduct. We disagree. The evidence only demonstrates that some owners chose not to retain appellants. Appellants' regular clients sought appellants' veterinary services before and after creation of CERF's registry system and thus the evidence does not show that an *ongoing* business relationship between appellants and their regular clients was somehow disrupted. Further, because appellants did not perform genetic eye-screening exams for purposes of an eye registry, CERF's registry system did not interfere with appellants' specific business relations.

Second, the record is devoid of evidence indicating that appellees intended to disrupt appellants' business relationships with their clients. Appellants state in their reply brief that appellees "knew or should have known" of the economic relationships between appellants and third persons, and that appellees "committed intentional acts designed to disrupt business relationships between non-ACVO plaintiffs and their customers and prospective customers". Appellants' Reply Brief, p. 5. Proof of these claims, however, does not reasonably support a finding that appellees intended to disrupt appellants' business relationships with

third persons. Motive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case, *Lowell v. Mother's Cake and Cookie Co.*, 79 Cal. App.3d 13, 18, 144 Cal. Rptr. 664, 668 (1978), and a strong showing of intent is required to establish liability. As we said in *De Voto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d at 1347:

> Tortious interference requires a state of mind and a purpose more culpable than the "intent" under the Restatement definition, however. The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability. Inquiry into the motive or purpose of the actor is necessary . . . . Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly. The extent of liability, for this tort, is fixed in part by the motive or purpose of the actor.

Appellees' conduct is neither criminal nor fraudulent and no aggravating circumstances appear in the record. The record is devoid of *direct* evidence of improper motive or purpose and we will not *infer* such motive merely because appellees "should have known" that creation of their registry injured appellants' business dealings. Further, it is our conclusion that appellees' motive in creating the canine eye registry was proper. CERF's requirement that ACVO-certified veterinarians administer the eye exams was motivated neither by the desire to disrupt appellants' business relations nor by an improper concern for economic reward. Instead, the requirement merely ensures that qualified individuals perform the eye examinations. The proffered

evidence thus fails to establish intent to injure appellants' business relations.

Finally, appellants failed to present competent evidence to prove damages. As previously discussed, appellants' damages proof was speculative at best. And since proof of the nature and extent of damages must be reasonably certain before recovery is warranted, *Lucky Auto Supply v. Turner,* 244 Cal. App. 2d 872, 883, 53 Cal. Rptr. 628, 634 (1966), appellants' interference with prospective economic advantage claim fails on the damages issue as well.

Viewing the record as a whole, the magistrate was not presented with substantial evidence supporting a finding by reasonable jurors in appellants' favor. Appellants failed to establish several elements of their intentional interference with prospective economic advantage claim, and thus the motion for directed verdict was properly granted.

Accordingly, the magistrate's rulings are hereby AFFIRMED.

Appendix B

United States District Court
for the Northern District of California

No. C 79 3053 SAW

(Judge Woodruff)

D.A. Rickards, M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs,

vs

Canine Eye Registration Foundation, Inc., et al.,
Defendants.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner and Dolly B. Trauner,
Counterclaimants,

vs.

D.A. Rickards, M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Counterclaim Defendants.

[Filed Oct. 1, 1981]

Findings of Fact and Conclusions of Law Re:
(1) Dismissal of Plaintiffs' Antitrust Injunctive Claims; and (2) Directed Verdict on Plaintiffs' Claims for Intentional Interference With Prospective Business Advantage

The above-entitled matter came on regularly for trial July 6, 1981 before the Honorable Owen E. Woodruff, Chief United States Magistrate, the parties having on June 24,

1980 waived their right to proceed before a Judge of the United States District Court and having consented pursuant to Title U.S.C. § 636(c) to a United States Magistrate conducting all proceedings in the case, including trial and entry of judgment. At trial, plaintiffs were represented by Joseph M. Alioto, Lawrence G. Papale and Russell F. Brasso of the firm of Alioto & Alioto, San Francisco, California. Defendants Lawrence M. Trauner, Dolly B. Trauner and Canine Eye Registration Foundation, Inc. were represented by Forrest A. Hainline, III and William J. Taylor of the firm of Brobeck, Phleger & Harrison, San Francisco. Defendants Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Dennis D. Olin and Randall H. Scagliotti were represented by Josef D. Cooper and Kirk A. McKinney of the Law Offices of Josef D. Cooper, P.C., San Francisco.

Plaintiffs' complaint alleges violations of §§ 1, 2 of the Sherman Act, Title 15 U.S.C. §§ 1, 2, corresponding California antitrust provisions, and the common law tort of intentional interference with prospective business advantage. Plaintiffs seek damages and injunctive relief.

Trial was to a jury on plaintiffs' common law damage claims and to the Court on plaintiffs' claims for injunctive relief under the California and federal antitrust laws, the Court having on June 24, 1981 granted defendants' motion for summary judgment against plaintiffs on their state and federal antitrust damage claims.

After plaintiffs completed presentation of their evidence, defendants moved for dismissal of plaintiffs' antitrust injunctive claims under Rule 41(b), F.R.Civ.P., on the

ground that plaintiffs had not shown any right to injunctive relief upon the proven facts and the law. The Court as trier of the facts on these claims then determined them and granted defendants' motion to dismiss. While the Court had initially indicated that a jury would be used in an advisory capacity on plaintiffs' injunctive claims, pursuant to Rule 39(c), F.R.Civ.P., because of potential overlap of factual issues on plaintiffs' antitrust injunctive and common law damage claims, the Court finds resort to such jury unnecessary for the injunctive claims in light of the disposition of the damage claims set forth below.

These Findings of Fact and Conclusions of Law are made on plaintiffs' claims for injunctive relief under the federal and state antitrust laws pursuant to Rule 52(a), F.R.Civ.P., and also in support of the Court's determination that plaintiffs have not presented substantial evidence that could support a reasonable jury finding awarding plaintiffs damages on their common law claims for intentional interference with prospective business advantages, and that accordingly a verdict must be directed for defendants on such pendent claims.

For purposes of the injunctive claims, the Court has fully considered plaintiffs' evidence, the testimony and demeanor of plaintiffs' witnesses and the governing law. For purposes of the common law damage claims, the Court has drawn in plaintiffs' favor all inferences which a reasonable jury could make, considering the evidence as a whole.

The Court, being fully advised, now makes the following:

I

FINDINGS OF FACT

I.1. The plaintiffs in this action are:

(a) Dr. D.A. Rickards, a veterinarian who has practiced in Cleveland, Ohio since 1963;

(b) Dr. M.A. Custer, a veterinarian who has practiced in San Diego, California since 1959;

(c) Dr. Paul V. Belkin, a veterinarian who has practiced in St. Louis, Missouri since 1952; and

(d) Dr. John S. Sleasman, a veterinarian who has practiced in Bremerton, Washington since 1973.

I.2. Defendants are:

(a) Canine Eye Registration Foundation, Inc. ("CERF"), a California non-profit corporation formed in 1974, with its principal place of business in San Francisco, California.

(b) Lawrence M. Trauner, M.D., a retired doctor who resides in San Francisco, and is president and a director of CERF.

(c) Mrs. Dolly B. Trauner, a resident of San Francisco, California, the Secretary/Treasurer and a director of CERF.

(d) Dr. Ralph C. Vierheller, a veterinarian who has practiced in La Habra, California since 1975.

(e) Dr. Alan D. MacMillan, a veterinarian who has practiced in San Diego, California since 1978.

(f) Dr. David E. Lipton, a veterinarian who has practiced in Richmond, California since 1974.

(g) Dr. Dennis D. Olin, a veterinarian who has practiced in Stockton, California since 1976.

(h) Dr. Randall H. Scagliotti, a veterinarian who has practiced in Sacramento, California since 1977.

I.3. Each plaintiff and each veterinarian defendant is a member of the American Veterinary Medical Association ("AVMA"), a professional organization representing the vast majority of American veterinarians. The AMVA, among other things, sanctions specialty boards in various areas of veterinary medicine, and in so doing, represents to the lay public that members of recognized specialty boards are in fact specialists and have proven themselves especially well qualified in particular areas of veterinary medicine.

I.4. The American College of Veterinary Ophthalmologists ("ACVO") is the specialty board recognized by the AVMA as being comprised of veterinarians who possess and have established their special training, skill and competence in veterinary ophthalmology. AVMA has recognized no veterinarians except members of ACVO as possessing special training, skill and competence in veterinary ophthalmology. Defendants Vierheller, Olin, Lipton, MacMillan and Scagliotti are members of ACVO. None of the plaintiffs are members of ACVO.

I.5. ACVO was formed in 1970. In 1972 and continuing to the present, under the aegis and general supervision of the AVMA, ACVO has administered an entrance examination to test the knowledge and achievement of persons who (a) have presented their credentials for admission into ACVO, and (b) have had their credentials approved by

the ACVO Credentials Committee pursuant to its operating procedures and guidelines. The multi-phase examination has been administered annually with a written Qualifying Examination and a subsequent Oral and Practical Examination administered to those who pass the Qualifying Exmination. The Qualifying Examination is not intended to evaluate a candidate's achievement in only those areas of knowledge necessary for performing a screening examination for detecting hereditary canine eye defects. Rather, the Qualifying Examination is designed to test the candidate's achievement level in the area of veterinary ophthalmology as a whole. The ACVO examination has been fair and impartial. Approximately 84% of the persons who have taken the ACVO Qualifying Examination have ultimately passed it.

I.6. Neither Dr. nor Mrs. Trauner, nor any officer or director of CERF, is a veterinarian or has any training in veterinary medicine. No officer or director of CERF ever had any connection with the formation or operation of ACVO, or with the ACVO examinations.

I.7. CERF was incorporated on November 12, 1974 as a non-profit, tax-exempt, charitable corporation. Its purposes, as stated in its 1974 Constitution, include: "To collect, collate and disseminate information concerning hereditary eye diseases in dogs by establishing a Registry for the listing of purebred dogs of those breeds which are susceptible to hereditary eye diseases, which have been examined and diagnosed as being phenotypically asymptomatic for these diseases at the time of examination by a Board certified veterinary ophthalmologist or by a veterinarian who has been designated by the American College

of Veterinary Ophthalmologists, or a committee thereof, as being qualified by postgraduate training in canine ophthalmology to perform such examinations."

I.8. Beginning in late 1975, CERF issued "certificates" to owners of dogs whose eyes had been examined by certain veterinarians and found asymptomatic (or "clear") of major heriditary eye defects at the time of the examination. A certificate was only issued if (a) the examination was performed by an ACVO member, using the examination form provided to the examiners free of charge by CERF; (b) the ACVO examiner returned one copy of the CERF form directly to CERF; (c) the dog owner sent to CERF the original, ink-signed copy of the form (indicating the dog was "clear" of major hereditary defects at the time of the examination) and a registration fee of $5.00; and (d) at the time of the examination, the dog satisfied the "minimum ages" criteria established for certification of certain breeds.

I.9. Whether or not the dog's owner ever applied for a certificate, CERF collected information regarding the examination from the individual examining veterinarians, and tabulated such results in periodic reports which CERF disseminated to veterinarians, breeders, dog clubs and researchers. Additionally, more detailed information regarding specific eye examinations was available from CERF upon request.

I.10. ACVO members and a special ACVO committee provided CERF with scientific advice regarding, e.g., nomenclature for specific diseases, determination of which diseases disqualified a dog from certification and the design of the examination form. An ACVO committee, and

subsequently the ACVO, approved the scientific aspects of the CERF examination form, and individual ACVO members used CERF examination forms and returned copies thereof to CERF for inclusion in its data.

I.11. CERF's decision to accept examination reports only from ACVO diplomates (or "designates") was made unilaterally by CERF, without consultation with any member of ACVO. No member of ACVO gave advice to CERF on its Constitution or By-laws before they were filed with the California Secretary of State. Thereafter, individual members of ACVO and other veterinarians (including certain defendants and plaintiffs) suggested to CERF that it establish criteria which would allow more veterinarians to perform eye screening examinations which would be acceptable to CERF. CERF declined to do so, motivated by reasons of quality control and its own inability to develop such criteria.

I.12. The ACVO never designated any non-ACVO member to CERF, although some members of ACVO were in favor of doing so. The ACVO determined that it was not its function to appoint "designates" for any other organization, and that its charter from the AVMA did not permit it to test for and/or recognize expertise in veterinary ophthalmology except through the ACVO membership process itself, as described in Paragraph 5, above.

I.13. CERF never accepted examination reports prepared by persons not members of ACVO. CERF applied its examiner requirements in a uniform and even-handed manner, and refused to accept examination reports even from veterinarians Mrs. Trauner personally believed to be competent, but who had not objectively demonstrated

their competence through the peer review procedures necessary for membership in ACVO. CERF would have accepted examination results for its program from any veterinarian (including plaintiffs) who demonstrated special skill, training and competence in veterinary ophthalmology by satisfying the requirements for membership in ACVO.

I.14. CERF offered a new service and product. Prior to CERF's incorporation, there had never been an all-breed eye registry which accumulated reliable examination data and offered verification to dog owners and breeders that an examination had been performed by a reliable examiner.

I.15. Dog breeders and veterinary researchers used and relied upon the CERF program and its data because CERF's examiners were known to be competent by an objective standard. Without an assurance that the CERF certificate signified an examination done by a qualified examiner (i.e., an ophthalmic specialist), the certificates would have had no value to breeders or owners of dogs. Unless researchers could be assured that the examinations had been performed by a reliable expert in ophthalmology, CERF's data compilation would be meaningless for scientific or research purposes.

I.16. CERF chose to accept examination results only from ACVO members in order to insure the quality and accuracy of its data and the reliability of its certificates. There is no evidence from which a reasonable jury could conclude that CERF's determination to use only ACVO examiners was motivated or intended to injure any veteri-

narian or interfere with any veterinarian's practice or livelihood.

I.17. Not all veterinarians are competent to perform eye screening examinations to detect the presence or absence of hereditary disease, including some veterinarians who claim to be competent in this specialized field. Non-veterinarians, including this Court, lack the expertise either to perform eye examinations for the CERF program or to identify which veterinarians have the necessary expertise.

I.18. No veterinarians except members of ACVO have ever been identified by name to the lay public by the AVMA, or any other veterinary organization, as being competent in veterinary ophthalmology. No test was ever devised and suggested to CERF by any segment of the veterinary profession as a means of identifying competent veterinary ophthalmologists, except the membership procedure of ACVO.

I.19. No plaintiff is a member of ACVO. Dr. Rickards sat for the Qualifying Examination seven times and failed each time. Dr. Belkin's credentials were rejected by the Credentials Committee in 1975 because he had failed to adequately communicate sufficient breadth of knowledge in his submitted case reports; Dr. Belkin never reapplied to the ACVO, although he was invited to do so. Neither Dr. Custer nor Dr. Sleasman ever applied to become ACVO members.

I.20. No plaintiff has objectively demonstrated by any process of peer review that he has special training, skill or competence in veterinary ophthalmology.

I.21. No entry barriers prevented plaintiffs or anyone else from establishing an eye registry program in competition with CERF.

I.22. CERF ceased its registration activities on June 1, 1979. During its existence, approximately 90,000 eye examinations were performed using CERF examination forms, including re-examinations of the same animal. The maximum of 90,000 dogs examined for a CERF certificate is but a small fraction of the total number of pure-breed dogs in the United States. The owners of only 8,900 dogs, or less than 10% of the total dogs examined using a CERF examination form, ever applied to CERF for issuance of a certificate.

I.23. On one occasion, Mrs. Trauner requested ACVO members for information on the fees they charged for eye screening examinations. No ACVO member defendant provided any fee information to her. Mrs. Trauner never communicated to anyone the fee information she received from some ACVO members.

I.24. There is no evidence of any agreement by or among defendants, or any of them, to fix prices. No evidence has been presented which might even suggest discussions or agreement among ACVO members regarding fees to be charged, and the charges by ACVO members for eye screening examinations frequently varied as much as 50%, between $5.00 and $7.50 per dog, and some examiners received nothing on certain occasions, some recouped only a portion of their travel expenses, and some received as much as $10.00 per dog.

I.25. The CERF certificate is a statement that an examination was performed by an ACVO member, the dog

was found to be free of phenotypic signs of genetic eye disease, and the results of the examination were reported to CERF. The CERF certificate, the CERF examination form and the examination performed by an ACVO member for issuance of such certificate constitute a single product, and not separate and distinct products.

I.26. CERF had no financial interest in either the examinations performed or the use of the CERF examination form. CERF distributed its examination forms free of charge and did not share in any examination fee charged by an examiner. Neither Dr. nor Mrs. Trauner received any remuneration for their activities on behalf of CERF, and no veterinarians received any remuneration from CERF for either providing scientific advice or sending data to CERF.

I.27. When CERF ceased its registration functions on June 1, 1979, it requested that unused examination forms be returned. Except for a short transition period necessary for certain examiners to order different forms for their own use, there is no evidence that any veterinarian defendant has used or even retained a CERF form since CERF's registration activities were discontinued.

I.28. There is no evidence regarding whether, under what circumstances or in what manner CERF would resume its discontinued registration activities.

I.29. A jury could not reasonably conclude that any plaintiff ever offered (or sought to offer) to clients any registration and/or third-party verification services for genetic ophthalmic screening examinations of purebreed dogs, such as CERF offered. Before, during and after CERF, plaintiffs offered certain other ophthalmic services

to clients. Breeders have continued to deal with plaintiffs for such services, and other veterinarians continue to refer clients to plaintiffs for such services.

I.30. There is no evidence from which a reasonable jury could conclude that any defendant even knew he was performing veterinary services for any former customer of any plaintiff, or that any defendant knowingly and consciously undertook to injure any plaintiff, motivated by any intent or desire to interfere with any potential relationship between any plaintiff and any potential client.

I.31. There is wholly insufficient evidence from which a reasonable jury could conclude that any plaintiff has established, with reasonable certainty, the amount of damages proximately caused by any act of any defendant. Any such award by a jury would be based upon speculation, conjecture and guess, and not on the evidence at trial.

I.32. The Court finds as a fact each matter hereafter set forth in its conclusions of law which may constitute a finding of fact or a mixed finding of fact and conclusion of law.

II

CONCLUSIONS OF LAW

II.1. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1337 with respect to plaintiffs' federal antitrust claims, and pendent jurisdiction over the California antitrust and common law claims. The Court has personal jurisdiction over defendants CERF, Dr. and Mrs. Trauner, and Drs. Vierheller, Olin, Lipton, Scagliotti and MacMillan, and has previously determined it does not have personal jurisdiction over ACVO,

AVMA or non-resident members of ACVO formerly named as defendants herein.

II.2. Defendants did not combine, conspire or agree to restrain trade, and the CERF programs and defendants' participation therein did not violate federal or California antitrust laws. CERF's determination to deal with only ACVO members for its registry did not constitute a group boycott, but rather an exclusive dealing arrangement. Exclusive dealing arrangements are not *per se* violations of the antitrust laws. Such claims must be evaluated under the Rule of Reason, i.e., whether such agreements constitute an unreasonable restraint of trade.

II.3. The burden of proving that a restraint is unreasonable is part of the plaintiffs' case-in-chief. Plaintiffs must establish a relevant market within which the alleged restraint operated, and that the alleged restraint was unreasonable given all the facts and circumstances. Relevant factors include the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or result to be obtained. Rules based upon concerns of quality and quality control are not anticompetitive and are therefore reasonable. Plaintiffs have not proven any relevant market narrower than the rendering of veterinary services in general. Nevertheless, under all of the facts and circumstances of this action, and regardless of the relevant market utilized, CERF's determination was not unreasonable, or adopted for anticompetitive reasons, and had no unreasonable effect on competition in the relevant market.

II.4. The inaction of plaintiffs Sleasman, Custer and Belkin in failing to apply for ACVO membership within

the four years preceding their complaint bars their antitrust claim for CERF's refusal to deal with them. Essential to a successful claim of refusal to deal is a showing by plaintiffs that they made a demand of the defendants and were refused, unless such a demand would be futile.

II.5. Defendants did not combine, conspire or agree to fix prices. To establish a price-fixing conspiracy, plaintiffs must show more than merely an attempt to gather price information. Moreover, plaintiffs have no standing to claim injury from the price-fixing alleged in the complaint.

II.6. There was no unlawful tie of the CERF registration to the use of the CERF examination form and/or services performed by an ACVO member. To establish an illegal tie-in arrangement, plaintiffs must establish that there are two distinct products or services, and that the seller of the tying product had an economic interest in the tied product.

II.7. Defendants did not attempt to monopolize or conspire to monopolize trade and commerce in violation of Section 2 of the Sherman Act, Title 15 U.S.C. § 2, or parallel state provisions. To establish a claim under Sherman Section 2, plaintiffs must establish (a) specific intent to control prices or destroy competition in some part of commerce; (b) predatory or anticompetitive conduct directed to accomplishing an unlawful purpose; and (c) a dangerous probability of success. Plaintiffs have failed to establish any of these elements.

II.8. Dissolution of CERF is not a proper or available remedy in private actions under the antitrust laws. The Court lacks personal jurisdiction to enter an injunction against ACVO or any other non-defendant.

II.9. To establish the propriety of other injunctive relief against the present defendants, plaintiffs must carry a heavy burden of showing (a) a past or impending violation of antitrust laws; (b) a continued threat or danger in the future as a result of an ongoing violation; (c) that the requested relief can be conveniently and effectively administered; and (d) that the balance of the public interest requires the relief. Plaintiffs must show more than just a mere possibility of recurrence of the alleged violation; plaintiffs must show a substantial probability or danger of recurrence. Plaintiffs have satisfied none of these elements, and are not entitled to injunctive relief on their state or federal antitrust claims.

II.10. The correct standard for the granting of a motion for a directed verdict is whether or not, viewing the evidence as a whole, plaintiffs have presented *substantial* evidence that could support a finding, by reasonable jurors, for plaintiffs. Plaintiffs have not satisfied this lenient standard.

II.11. The tort of intentional interference with prospective business advantage requires plaintiffs to establish each of the following five elements: (1) specific economic relationship with an identifiable third party containing the probability of economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed and motivated to disrupt the relationship; (4) actual disruption of the relationship; and (5) reasonably certain damages to plaintiff, proximately caused by the acts of defendants. Plaintiffs must establish culpable intent by defendants. Plaintiffs have not presented substantial evi-

dence from which a jury could reasonably conclude that plaintiffs had such a specific relationship (involving an examination done for purposes of the CERF program) with identifiable third-persons within the two years preceding the complaint, that defendants knew of such relationships, or that defendants acted with the requisite culpable or exclusionary intent. Moreover, if defendants' conduct is reasonable for purposes of Section 1 of the Sherman Act, such a finding precludes recovery for claims of unlawful interference with prospective business advantage.

II.12. Damages for this tort must be proven with reasonable certainty, and not through evidence which renders the alleged damages uncertain, speculative, or remote. There is no evidence from which a jury could reasonably award damages to plaintiffs on account of the alleged tort, even if the other elements had been satisfied.

II.13. The Court makes as a further conclusion of law anything set forth above as a finding of fact which is a conclusion of law or a mixed finding of fact and conclusion of law.

Counsel for defendants are directed to prepare an appropriate form of judgment in accordance with the above findings and conclusions.

DATED: September 30, 1981
San Francisco, California

/s/ OWEN E. WOODRUFF, JR.
Hon. Owen E. Woodruff, Jr.
Chief United States Magistrate

Appendix C

United States District Court
Northern District of California

No. C-79-3053-SAW

D. A. Rickards, M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs,

v.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton,
Alan D. MacMillan, Dennis D. Olin, Randy Scagliotti,
and Ralph C. Vierheller,
Defendants.

Canine Eye Registration Fondation, Inc.,
Lawrence M. Trauner and Dolly B. Trauner,
Counterclaimants,

v.

D. A. Rickards, M.A. Custer, Paul V. Belkin
and John S. Sleasman,
Counterclaim Defendants.

[Filed June 24, 1981]

MEMORANDUM AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' STATE AND FEDERAL ANTITRUST CLAIMS

I. INTRODUCTION

The defendants move for summary judgment on plaintiffs' state and federal antitrust claims "based upon the critical absence of competent, admissible evidence of plaintiffs' damages, which is a necessary affirmative element of plaintiffs' case." Defendants' Notice of Motion and Motion . . . for Summary Judgment, p. 2, l. 21-23, filed June 10, 1981. This motion was made as part of a motion *in limine* for an order precluding plaintiffs from offering at trial (1) testimony of expert witnesses not identified by name during discovery or in the Joint Pretrial Statement, and (2) any exhibits not previously identified in "Plaintiffs' Exhibits, Schedules and Summaries." This motion, along with several other *in limine* motions, was briefed in accordance with the schedule established by the Court at the pretrail conferenced on June 5, 1981 and was argued orally at a hearing before the Court on June 22, 1981. At that hearing the Court granted the *in limine* motion as to expert testimony and denied it as to exhibits and then asked for oral argument on the summary judgment motion in view of its ruling on the *in limine* motion.

Having considered those oral arguments, along with the memoranda and affidavits on the motion and other pertinent portions of the record, the Court GRANTS the defendants' motion.

The basis for the Court's decision is set out in the following paragraphs.

II. PROCEDURAL BACKGROUND

This motion comes on the eve of trial. The plaintiffs' filed the complaint in this action on October 31, 1979. The parties have been vigorous during the discovery phase of

the litigation and have produced volumes of material to each other. The pretrial conference has been held and concluded. Jury selection commences two days following oral arguments on the motion.

The Court finds the timing of the summary judgment motion significant because the case is in all respects ready for trial: discovery has been completed and the final lists of witnesses and exhibits to be offered at trial (except for impeachment or rebuttal) have been exchanged. With the case in this posture the Court can with certainty and ease identify the presence or absence of a genuine issue of material fact.

III. SUBSTANCE OF THE MOTION

Defendants argue that the plaintiffs have both the burden of proof and the burden of persuasion on the issue of the amount of their damages, that the plaintiffs have no competent evidence to offer a jury to prove the amount of their damages, and that without such evidence the plaintiffs can meet neither burden. Accordingly, the defendants conclude, they are entitled to judgment as a matter of law on all the plaintiffs' damage claims under the federal and state antitrust laws.

IV. APPLICABLE LAW RE: PROOF OF AMOUNT OF DAMAGES

Judge William W Schwarzer has recently summarized the proof requirements applicable to this case:

> To meet the minimum requirement of proof in a market exclusion case in which lost profits are sought, plaintiff must normally produce evidence falling into one of the following categories:

(1) Comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions; *Bigelow v. RKO Radio Pictures, Inc., supra*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 376-78, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Pacific Coast Agricultural Export Association Sunkist Growers, Inc.*, 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d (1976);

(2) Comparison of performance in restrained and unrestrained markets which are otherwise comparable; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Bigelow v. RKO Radio Pictures, Inc., supra*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714-15 (9th Cir. 1959), *cert. denied*, 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960); or

(3) Loss of specific business or customers; *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 913 (2nd Cir.), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1131, 8 L.Ed.2d 85 (1962).

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841, 863 (N.D.Cal. 1979), *aff'd sub nom Murphy Tugboat Co. v. Crowley*, ... F.2d ....., (9th Cir.) (slip op. 2044). The evidence offered under any of these categories must be based on relevant data sufficient to enable the jury to make a just and reasonable estimate of the amount of the damages. "[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Causation is a factor in proof of both the fact of damage and the amount of that damage. For purposes of this motion, the Court assumes arguendo proof of the fact of damage and focuses on the sufficiency of the proof of the amount. While a plaintiff need not negative all alternative explanations for his decline in profits, *Knutson v. Dailey Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976), "unless the amount sought to be recovered is shown to be 'definitely attributable' to defendant's wrongful conduct, there is no basis for making a 'just and reasonable estimate'." *Murphy, supra* at 863.

V. EVIDENCE CITED BY DEFENDANTS

Defendants cite statements made by each of the plaintiffs in their deposition testimony where they each admit that they cannot estimate their lost profits without referring to their records. (Def. Memo in Support, pp. 10-29, filed June 10, 1981). Defendants note that none of those records have been designated as trial exhibits, nor have any studies, analyses or summaries based on those records been so designated. No expert has been identified. Without such evidence, defendants argue, there is no relevant data for a jury to make a just and reasonable estimate of the plaintiffs' lost profits. Accordingly, defendants argue the plaintiffs cannot prove damages amounts under *Murphy* categories (1) and (2) since they cannot establish a benchmark against which to measure their profits absent the alleged violation.

The remaining category—loss of specific business or customers—is, the defendants argue, equally devoid of sufficient proof. In support of their argument defendants cite deposition testimony of plaintiffs Rickards and Belkins to

the effect that any estimate of how much specific business they lost would be speculative. In addition, defendants note that no plaintiff has designated any exhibit which would serve to translate a supposed number of patients they would have seen but for the alleged violation into a specific damage figure. Defendants argue that absent such evidence, even if a specific number of lost patients could be adequately proven, the jury's computation of a specific damage amount would be without evidentiary support and that such speculation or guesswork must, as a matter of law, be excluded in a jury trial.

VI. BURDEN AT SUMMARY JUDGMENT

The relationship between the burden of proof at trial and on a summary judgment motion and the proof required to shift the burden on the motion is succinctly summarized by the Ninth Circuit in *Doff v. Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967), where the Court said,

> [O]n a motion for summary judgment it is the moving party who carries the burden of proof; he must show that no genuine issue of material fact exists and this is true even though at the trial his opponent would have the burden of proving the facts alleged. [omitting citations] . . .
>
> Where, on the basis of the materials presented by his affidavits, the moving party, if at trial, would be entitled to a directed verdict unless contradicted, it rests upon the opposing party at least to specify some evidence to show that such contradiction is possible. [omitting citations] . . . The burden of coming forward with specific controverting facts shifts to the opponent. [omitting citations] . . . It is his duty to expose the existence of a genuine issue which will prevent the trial

> from being a useless formality. [omitting citations] . . . If he has a plausible ground of defense, he must assert it. [omitting citations]

In this case the defendants as moving party have the burden of showing the absence of a genuine issue of material fact, even though the plaintiffs have the burdens of production and proof at trial. The Court has viewed evidence defendants have presented and inferences therefrom in a light most favorable to the plaintiffs. *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 63 (9th Cir. 1973). Nonetheless, the Court is satisfied that defendants would, if at trial, be entitled to a directed verdict on the basis of the materials they have presented, unless those materials were contradicted.

Accordingly, the Court has reviewed plaintiffs' papers, treating them indulgently, *Doff, supra* at 804, to find specific controverting facts.

VII. EVIDENCE CITED BY PLAINTIFFS

The Court has considered the arguments made by plaintiffs that there is no authority for the "reach and result" of the *in limine* motions and that the *in limine* and summary judgment motions are contrary to the directives of the Court and the agreement of the parties and finds them to be without merit.

The Court has perused the plaintiffs' papers to find the specific evidence upon which plaintiffs rely in proving the amount of their damages. At the June 22, 1981 hearing the Court was quite direct in seeking this information:

> **[The Court to Mr. Brasso, Attorney for Plaintiffs] Tell me now how you are going to prove the damage**

> phase of your antitrust claim. What evidence do you have in mind that you are going to present that is going to establish your damages.

Rptrs Transcript, June 22, 1981 at p. ....., l. .....

The plaintiffs' theory of damages seems to be as follows:

> Damages may be proven by any reasonable method. The two most common are the before-and-after approach, and the yardstick method. Under the before-and-after approach, it is appropriate to compare plaintiffs' performance during a violation-free period to his presumably poorer performance during the period of violation. The yardstick is a comparison of plaintiffs' performance during the period of violation to the performance of defendants engaged in a business similar to plaintiffs which is free from restraint (i.e., defendants' businesses).

Plaintiffs' Opposition Memorandum, Exhibit A, p. 2, filed June 18, 1981.

These theories are the same as *Murphy* categories (1) and (2). So that the matter is free from doubt the Court has also scrutinized the record for proof of an amount of damages under *Murphy* category (3).

Plaintiffs argue that defendants have selectively edited plaintiffs' deposition testimony to create merely the appearance that plaintiffs cannot prove damages. The Court has examined the testimony cited by plaintiffs and do not find any statements controverting defendants' claim that plaintiffs' conclusions as to their specific damage amounts are purely speculative.

In Exhibit A, plaintiffs discuss evidence that shows the fees competitors received from examinations of dogs eyes

as recorded on CERF forms. Assuming without deciding that such evidence is probative of competitors profits resulting from the violation, the plaintiffs must still establish a benchmark against which the restraint-free profits can be measured. On this issue plaintiffs rely on the depositions discussed above, certain interrogatory answers of plaintiffs, and income tax records and certain financial statements of plaintiffs. As noted above, the depositions contain no testimony which adequately specifies the factual basis for making a just and reasonable estimate of a damage amount. Plaintiffs cite an interrogatory answer and argue that plaintiffs will testify at trial to the same effect. The Court has examined this interrogatory response to determine whether such testimony would permit a jury to make a just and reasonable estimate of the amount of damages. First, the Court notes that no documents were attached to support the conclusions offered. Next, the Court notes that no such documents have been designated as exhibits for trial. In short, plaintiffs offer raw, conclusory opinion. There are no computations in the record to support the particular numbers which plaintiffs would offer the jury. While plaintiffs might be allowed to express an opinion on the value or performance of their practices, they cannot in the absence of factual underpinnings opine regarding what they believe to be the amount of their lost profits. See *Pacific Mailing Equipment Corp. v. Pitney-Bowes, Inc.*, 499 F. Supp. 108, 119-20 (N.D.Cal. 1980); *cf. Murphy, supra* at 864 (an economic expert's opinion, unsupported by facts, is not probative of antitrust damages). Next, the Court considered the possibility that the plaintiffs' income tax returns and certain financial statements would controvert the defendants' showing. They do not because they

fail to reflect the source or the underlying computations and raise no inference of an amount of damage flowing from an antitrust injury. See *Pacific Mailing, supra* at 118.

As noted above, the Court sought edification from the plaintiffs at the hearing on June 22, 1981, as to exactly what evidence they proposed relying on in their proof of damages. Plaintiffs reiterated the arguments and citations made in their papers. They suggested that perhaps further evidence could be adduced in rebuttal, but agreed with the Court that whatever that evidence might be it would not save them from a directed verdict, nor a summary judgment.

VIII. CONCLUSION

The Court has concluded above that defendants would, if at trial, be entitled to a directed verdict on the basis of the showing they have made on their motion. After considering the plaintiffs' arguments, oral and written, and after perusing the record in this case, the Court concludes that plaintiffs have failed to expose the existence of a genuine issue of material fact and have failed to controvert the showing of defendants that they are entitled to judgment as a matter of law. This Court joins in the comment of Justice Thurgood Marshall:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence to support the complaint.

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968).

Summary judgment in this instance is all the more appropriate because the Court finds *no* relevant data from which a jury could make a fair and reasonable estimate of the amount of damages plaintiffs may have suffered.

Accordingly, the Court grants the defendants' motion for summary judgment on all the plaintiffs' state* and federal antitrust damage claims.

IT IS SO ORDERED.

Dated: June 24, 1981

/s/ OWEN E. WOODRUFF, JR.

Owen E. Woodruff, Jr.
United States Magistrate

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*The California law of antitrust is patterned after the federal antitrust laws and both have their roots in the common law. Both California state courts and federal courts sitting in California have held that federal cases interpreting the federal law are applicable to problems arising under the California state laws. See e.g., *General Communications Engineering, Inc. v. Motorola Communications and Electronics, Inc.*, 421 F. Supp. 274, 294 (N.D.Cal. 1976) (Peckham, Chief Judge); *Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976). Acordingly, this Court finds that the facts and the federal law which entitle defendants to summary judgment on the federal claim are applicable to the state law damage claims and entitle defendants to summary judgment on those claims as well.

Appendix D

United States District Court
Northern District of California

No. C-79-3053-SAW

D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman,
Plaintiffs,

v.

Canine Eye Registration Foundation, Inc., et al.,
Defendants.

Canine Eye Registration Foundation, Inc., Lawrence M. Trauner and Dolly B. Trauner,
Counterclaimants,

v.

D.A. Rickards, M.A. Custer, Paul V. Belkin and John S. Sleasman,
Counterclaim Defendants.

[Filed Nov. 17, 1981]

Partial Final Judgment, Pursuant to Rule 54(b), Dismissing With Prejudice Plaintiffs' Claims Against Defendants Dolly B. Trauner, Lawrence M. Trauner, Canine Eye Registration Foundation, Inc., Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Randall H. Scagliotti and Dennis D. Olin

A. Plaintiffs in the above-captioned action filed their complaint herein on October 31, 1979, alleging that defendants and unnamed co-conspirators violated state and federal antitrust laws, as well as the common law of the State of California.

B. On June 24, 1981, the Court entered its "Memorandum Opinion" granting summary judgment against plaintiffs' state and federal antitrust damage claims, leaving plaintiffs' remaining common law damage claims and antitrust injunctive claims for trial. The parties having stipulated to a trial (including authority or entry of judgment) before the undersigned United States Magistrate pursuant to Title 28, United States Code, Section 636, trial was held, commencing July 6, 1981, with a jury on the damage claims and an advisory jury on the injunctive claims. At the close of plaintiffs' case, the Court granted defendants' motion for a directed verdict on the remaining common law claims for intentional interference with prospective business advantage, dismissed the claims for injunctive relief under federal and state antitrust laws, and entered Findings of Fact and Conclusions of Law with respect thereto.

WHEREFORE, good cause appearing therefor, it is hereby ORDERED, ADJUDGED AND DECREED:

1. This Court has jurisdiction over the subject matter of this litigation, and personal jurisdiction over all plaintiffs and defendants Lawrence M. Trauner, Dolly B. Trauner, Canine Eye Registration Foundation, Inc., Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Randall H. Scagliotti and Dennis D. Olin.

2. Judgment shall be, and it is hereby entered dismissing, with prejudice, on the merits, all claims or causes

of action contained in the above-captioned action against the foregoing defendants. This judgment does not affect the counterclaims of defendants-counterclaimants Lawrence M. Trauner, Dolly B. Trauner and Canine Eye Registration Foundation, Inc. against plaintiffs.

3. Taxable costs are awarded to defendants.

4. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, this Court hereby expressly determines that there is no just reason for delay in entering a final, appealable judgment of dismissal, and hereby expressly directs the Clerk of the Court to enter forthwith this Partial Final Judgment, dismissing all of plaintiffs' claims against defendants Lawrence M. Trauner, Dolly B. Trauner, Canine Eye Registration Foundation, Inc., Ralph C. Vierheller, Alan D. MacMillan, David E. Lipton, Randall H. Scagliotti and Dennis D. Olin, with prejudice.

5. It is further ordered that new trial of the counterclaim shall be stayed pending appeal on dismissal and directed verdict of all plaintiffs' claims.

Dated: November 17, 1981

/s/ OWEN E. WOODRUFF, JR.

Owen E. Woodruff, Jr.
Chief United States Magistrate

Appendix E

United States Court of Appeals
for the Ninth Circuit

No. 81-4668

D. A. Rickards, M. A. Custer, Paul V. Belkin
and John S. Sleasman,
Plaintiffs-Appellants,

vs.

Canine Eye Registration Foundation, Inc.,
Lawrence M. Trauner, Dolly B. Trauner, David E. Lipton,
Alan D. Macmillan, Dennis D. Olin, Randall H. Scagliotti
and Ralph C. Vierheller,
Defendants-Appellees.

Before: DUNIWAY and BOOCHEVER, Circuit Judges,
and KEEP,* District Judge

[Filed July 27, 1983]

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

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*The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.